REPORTS
OF
ELECTION CASES

By THOMAS HODGINS, Q.C.

PART IV.,
DOMINION ELECTIONS, 1874,

Under "An Act to make Temporary Provision for the Election of Members to serve in the House of Commons" (36 Vic., c. 27, Can.), "The Controverted Elections Act, 1873" (36 Vic., c. 28, Can.), "The Dominion Elections Act, 1874" (37 Vic., c. 9, Can.), and "The Dominion Controverted Elections Act, 1874" (37 Vic., c. 10, Can.)

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TORONTO:
CARSWELL & COMPANY.
1882.

CORNWALL.

BEFORE CHANCELLOR SPRAGGE.

CORNWALL, *3rd to 7th September, 1874.*

DARBY BERGIN, *Petitioner*, v. ALEXANDER F. MACDONALD, *Respondent.*

Common Law of Parliament—Corrupt practices—Acts of agency—Agents—Sub-Agents—Costs.

The common law of England relating to Parliamentary elections is in force in Ontario, and applies to elections for the House of Commons.

The Parliamentary law of agency is a special law, and is different from the ordinary law of agency. In Parliamentary elections the principal is liable for all acts of his agent, even where such acts are done contrary to the express instructions of such principal.

Mere canvassing of itself does not prove agency, but it tends to prove it. A number of acts, no one of which might in itself be conclusive proof of agency, may, when taken together, amount to proof of such agency.

Persons who canvassed and went to meetings with the respondent, and attended meetings to promote the election, at which meetings the respondent attended; and persons who canvassed with and introduced voters to the respondent, called meetings and appointed canvassers, and did other acts to further the election, and examined the results of the canvass, were held to be agents of the respondent; and corrupt practices committed by them, and by sub-agents appointed by them, avoided the election.

If a meeting of electors assembles and has the sanction of the candidate, such candidate is responsible for its acts and the acts of the agents appointed by it.

But where the meeting is large, then all present cannot be considered as agents; only those to whom certain duties, either as a committee or as individual canvassers, are assigned.

Bribery is not confined to the actual giving of money. Where a grossly inadequate price has been paid for work or for an article, it is clearly bribery.

A large sum of money, averaging $3 per head, had been spent by two of the agents of the respondent, and money had been given by them to parties without any instructions:

Held, that where such money had been applied improperly, it must be considered that it was intended to be so applied.

Various acts of bribery and of colorable charity having been proved against the agents and sub-agents of the respondent, the election was set aside, with costs, including the costs of the evidence on the personal charges against the respondent.

The petition contained the usual charges of corrupt practices, but the seat was not claimed by the petitioner,

who was the unsuccessful candidate. The evidence affecting the election is referred to in the judgment.

The election took place on the 22nd and 29th January, 1874.

Mr. Bethune and Mr. A. F. McIntyre for petitioner.

Mr. R. A. Harrison, Q. C., *Mr. D. B. Maclennan and Mr. H. S. Macdonald*, for respondent.

SPRAGGE, C.—The inquiry divided itself into two branches. 1st. That relating to the question of agency. 2nd. That relating to the commission of corrupt practices.

With reference to the question of agency, the contention of the counsel for the respondent, that what is known as the common law of Parliament does not apply to elections to the House of Commons, cannot, in my opinion, be supported. It would be more accurate to refer to this law as the common law of England relating to Parliamentary elections; and in the absence of any expressed intention to the contrary, it must be held to come within the provincial enactments introducing generally the common law of England. *Reg.* v. *Gamble & Boulton* (9 U. C. Q. B. 546) is an authority in support of this view.

The law of agency as regards Parliamentary elections is not the ordinary law of agency, but a special law. The usual rule is, that where an agent acts contrary to his instructions, the principal is not bound; but in parliamentary agency it is different, for there the principal is liable for all acts of the agent whatsoever, even though they be done contrary to his express instructions. *Bewdley case* (1 O'M. & H. 16).

As to the evidence of agency, mere canvassing of itself does not prove agency, but it tends to prove it. An act, however trifling in itself, may be evidence of agency; and a number of acts, no one of which might in itself be conclusive evidence, may together amount to proof. It

is hardly necessary to observe that an agent need not be a paid agent.

In this case Mr. D. B. Maclennan was an agent for whose acts the respondent was responsible. Mr. Maclennan was instrumental in overcoming the reluctance of the respondent to become a candidate. He acted with the respondent in various matters connected with the election; went to the factories at Cornwall with him; canvassed part of the town; went to the meetings at St. Andrews with the respondent; held meetings for the promotion of the election at his office, at which the respondent personally attended. It was a clear case of agency. Even two or three of these circumstances alone, perhaps even one, without the others, would establish agency clearly. There was no authority from the respondent to Maclennan to corrupt the constituency, but there was no necessity for this authority in order to render the respondent liable for corrupt acts done by Maclennan.

The entrusting of large sums of money, as has been done in some cases in England, is only one of the modes of appointing a chief agent, and is not essential to such appointment.

Henry Sandfield Macdonald must also be considered as an agent of the respondent. He canvassed the township with the approbation of the respondent. He drove the respondent through the township and introduced him to voters, and he did not on these occasions accompany the respondent as a mere driver, for the respondent on two or three occasions waited for his convenience, showing that his personal attendance was considered desirable. He took so active a part in the election that he considered himself justified in calling the meetings at St. Andrews. At the first meeting he suggested to those present what should be done to further the election; at the second he examined the results of the canvass. The evidence of agency was very cogent.

I think the general authority given to D. B. Maclennan and H. Sandfield Macdonald empowered them to employ

sub-agents, for whose acts the respondent would be liable in like manner as for their own acts.

Besides Mr. D. B. Maclennan and Mr. Henry Sandfield Macdonald, the sub-agents appointed by them, and those who were appointed canvassers at the meetings in St. Andrews and in town, must also be considered agents for whom the respondent is answerable.

With reference to the first meeting at St. Andrews, it has been said that it was not regularly convened. Certainly there was less regularity and formality about its calling than is usual in such cases. But this regularity or formality is by no means necessary. If the meeting assembles, and has the sanction of the candidate, this is sufficient to render the candidate liable for its acts, and those of agents appointed by it. The object of the meetings at St. Andrews was to secure a canvass of the township, not merely to discuss election matters.

Where the number of those present at a meeting is very large, that is a reason why all present should not be considered as being appointed agents. It is clear in this case that the whole 150 or 200 present at the meeting were not appointed agents; certain of them only were requested to canvass their neighborhoods, and, to use the words of a witness, "to interest themselves in the election." It is these persons alone who can be considered as agents. It is immaterial whether a committee be formally or informally appointed. It is sufficient if certain duties be assigned to its members and the candidate sanction this assignment of duties. Here the respondent drove out to the meetings with Mr. D. B. Maclennan, one of his chief agents. He was present during the meetings, and was there undoubtedly to further his own election. He cannot be considered as a mere spectator. Being present at the meetings, he must be presumed to have been cognizant of all that was done, and therefore must be considered as having acquiesced in all that was done. Even if the respondent had not been present himself, the presence of his chief agents, Maclennan and Henry Sand-

field Macdonald, would have rendered him liable for the action of the meeting. We must not look at the form but at the substance of what took place. And I think that the canvassers appointed at the St. Andrews meetings must be considered as agents for whom the respondent is responsible. The *Westminster case* (1 O'M. & H. 89) and the *Wigan case* (*ibid.* 188) do not apply. In those cases the associations were without doubt voluntary.

As to the meetings at Maclennan & Macdonald's office in Cornwall, the persons who attended those meetings must be deemed agents of the respondent. These persons examined the voters' lists, appointed canvassers, and received reports of his canvass. The usual formalities, as to calling together the meetings, and the transaction of business, appear to have been observed, but this was unnecessary. The respondent acquiesced in the acts done. *Taunton case* (1 O'M. & H. 185-6); *Coventry case* (*ibid.* 107).

As to the second branch of the case, namely, that relating to the commission of corrupt practices, these consist principally of acts of bribery. Bribery is not confined to the actual *giving* of money. Being an unlawful act, it is to be expected that attempts will be made to conceal it from the light of day. The courts, therefore, have always examined the various acts connected with the transaction, to see whether there is a corrupt motive. Where a grossly inadequate price has been paid for work, or for an article, it is clearly bribery. And in the present case several instances of such bribery occur. In considering the question of corrupt practices as affecting any particular election, we should also examine the whole evidence carefully to ascertain the mode and spirit in which the election contest has been carried on; whether it has been on the whole pure and free from corruption, or whether there has been a general laxity of principle and evident disregard of the law. When the corrupt acts are isolated much greater strictness of proof will be required.

One thing that strikes me in this case is the large sum expended by the two chief agents of the respondent, a sum averaging about $3 a head for the votes polled for the respondent.

Large amounts were also paid without any express directions as to their application, amounts which would not be required for any legitimate use. In the case of Donald Miles McMillan, for example, the words used upon the money being handed to him were, "Here, you may require it." If this money were applied improperly, it must be considered that it was intended so to be applied.

Again, when H. Sandfield Macdonald, having "heard that the north-west corner was corrupt," gave $140 or $150 to George McDonald, of Moulinette, to expend there, without any directions as to the mode of expenditure, the only inference must be that it was to be expended in order to corrupt. This inference is supported by the statement of George McDonald, who, on being asked why he accepted the money, replied that he was apprehensive "that the other side were going to bribe," which implies that he considered his side should do so as well.

There were many similar cases in which considerable sums of money were paid without directions as to the application, but it is unnecessary to dwell upon these further than for the purpose of showing the general spirit in which the contest was carried on on behalf of the respondent. In the case of Gilbert Runions, bribery with the knowledge and consent of Henry Sandfield Macdonald, one of the chief agents of the respondent, is proved.

Henry Sandfield Macdonald, when he handed the money to George McDonald, named Runions as a person to whom money should be given; and the money was paid to Runions by G. McDonald, as Runions admits. This is the same as if H. S. Macdonald gave it himself.

The evidence of George McDonald and that of Runions differs as to the amount paid, but this is immaterial —money was paid.

In other cases Henry Sandfield Macdonald left the giving of the money to George McDonald "on discretion." This was a direct appointment of George McDonald as agent. And in exercise of this discretion, George McDonald bribed Cannon and the two Worleys.

The payments by Donald Miles McMillan to the Clines and to Murray are other instances of bribery. In the case of the Clines, McMillan paid money to them, or, as he afterwards says, to one of them, nominally for the purchase of oats, but at the time of the alleged purchase no quantity of oats was named, no time for delivery was specified, no receipt for the money was taken, and no oats have, as a matter of fact, been delivered; the alleged purchase was undoubtedly a mere colorable proceeding. The fact that the Clines and Murray declared their intention to vote for the respondent does not affect the case.

Again, the payment of $10 to Alguire by Henry Sandfield Macdonald falls within the rule of inordinate and excessive payment. Where $4 or $5 would have been sufficient, the excess must be considered as given for some other purpose, which purpose was "corrupt."

The payment of $50 to the Rev. Mr. Smith, I think, falls within the rule as to "colorable charity," or "colorable liberality," referred to in the cases, and was therefore given with a corrupt motive.

With reference to the loans of small sums to various persons, we must of course take into consideration that the firm of Maclennan & Macdonald was in the habit of lending small sums. But the lending of various sums, amounting to $210, at 6 per cent., is certainly suspicious, since it is admitted by Mr. Macdonald that the current rate was 8 per cent., and no reason is given why 6 per cent. only was asked. I think the reasonable inference must be that the loans were made with a view to the election. It is not necessary, however, to lay much stress upon these transactions.

The loan of $150 to Depuis is very clearly a case of bribery by Duncan G. McDonald, a sub-agent. The loan was for two years, without interest, a note being given to secure repayment. The note was originally drawn payable with interest, but this was changed. Depuis says in his evidence that McDonald "got nothing but my vote for the money." Is not this a stipulation that Depuis should have the loan without interest if he would vote? Was it not a present of the two years' interest?

Again, Morrisette was an active agent. He attended the meetings at Maclennan & Macdonald's office in Cornwall. He examined the voters' lists. He had $140 entrusted to him. As to the disposition of this money he gives a very confused account, but the promise of $15 to Fitzpatrick's daughter was clearly an offer of a bribe. He said he would give the money if she got her father to vote, and the offer of a bribe is equivalent to a bribe, although it requires clearer and stronger evidence to support it.

The payment of money by Wood to Aaron Walsh was also illegal. Here the note endorsed by Walsh was paid by him 25 years ago. He considered the payment a hardship, but he does not deny his liability. The fact that the money paid by Wood was not furnished by the respondent or either of his chief agents, makes no difference. The endeavor by Wood to restore friendship was undoubtedly done to influence the vote.

In the case of Alexander McDonald, the exercise of forbearance in pressing the judgment in the hands of Maclennan & Macdonald was evidently with the view of influencing the vote.

These cases of bribery are sufficient to render the election of the respondent void, and I shall only make a few remarks on the other circumstances disclosed in evidence.

The case of Charles Mullins was a very gross case. A stratagem was used in inducing him to get into the sleigh driven by Grant, and in spite of his remonstrances he was driven into the country and thereby prevented from

voting. I consider the conduct of Donald McMillan—justice of the peace, who was present, and knew that an outrage was about to be committed and yet did not interfere—as deserving of the strongest censure. The case is as gross a one as can well be conceived.

As to the hiring of the special train, I think there was no personal impropriety in the case. A mere hiring of a conveyance to carry voters is not an act wrong in itself, and would not be so at all but for the express provisions of the law. And I am inclined to think that the hiring in this instance does not fall within the meaning of the law, and that it is the same as the case of one sending his own carriage.

I am not required in this case to say whether the corruption was so general as that the election should on that account be set aside, but an election may undoubtedly be void on that ground. *Bradford case* (1 O'M. & H. 40).

I exonerate the respondent personally from any complicity in the corrupt acts committed; but I think it my duty to say that I can scarcely conceive that Mr. D. B. Maclennan and Mr. H. S. Macdonald would have acted in the manner in which they appear to have acted at this election if they had appreciated the gravity of the acts committed by them.

My judgment, therefore, is that the election is void. Costs to be paid by the respondent.

I do not think that the fact that the personal charges against the respondent have failed should alter the usual rule that costs follow the event. The expense of the trial has not been increased by these personal charges, and they have not been put in wantonly, in order to wound the feelings of the respondent; if they had been, that might have altered the case. These charges also are usual, and are excusable on the ground that the opposite party is generally ignorant of what is done by the respondent; and in order that evidence affecting the candidate personally may be given, these charges must be made in the petition.

(8 *Commons Journal*, 1875, p. 3).

SOUTH RENFREW.

BEFORE CHANCELLOR SPRAGGE.

RENFREW, *9th September, 1874.*

WILLIAM BANNERMAN, *Petitioner*, v. JOHN LORN MCDOUGALL, *Respondent.*

Costs—Preliminary inquiry—Excessive expenditure.

The respondent sought to establish, on an inquiry under a preliminary objection, that the petitioner (the opposing candidate) had been guilty of bribery, and was therefore disqualified as such. The inquiry was not concluded, as during its pendency the English Election Courts held that bribery would not disqualify a petitioner; but so far as the evidence went, while it disclosed such a large expenditure of money by the petitioner and his agents as to lead to the suspicion it was not all expended for the legitimate purposes of the election, it did not show bribery by the petitioner. The respondent then consented to his election being avoided on the ground of bribery by one of his agents without his knowledge or consent:

Held, that the general rule as to costs should prevail, and that the respondent should pay the costs of the inquiry as well as the general costs of the cause.

Semble, if evidence showed that corrupt practices had been committed by a respondent, it would be the duty of the Court so to adjudicate whether the petitioner was willing to withdraw the charge or not.

The petition contained the usual charges of corrupt practices.

The respondent set up, by way of preliminary objection, that the petitioner had been guilty of bribery, and therefore had no status as a petitioner. Evidence was taken at Brockville in support of this allegation, and showed a large expenditure of money by the petitioner and his agents at the election complained of. It however became unnecessary to proceed with the inquiry, as, pending the investigation, the English Court of Common Pleas, in the *Launceston case, Drinkwater* v. *Deakin* (L. R., 9 C. P. 626), held that even if bribery were proved against a candidate-petitioner, he was not disqualified as a petitioner.

The trial was then proceeded with at the town of Renfrew.

Mr. McCarthy, Q.C., for petitioner.

Mr. Bethune for respondent.

After the case had been partially heard, the respondent's counsel said after consulting with his client he had found that there was one case of corrupt practice committed by an agent without the knowledge and consent of the respondent, but for which the respondent was responsible to the extent of his seat, and which would avoid the election; but he did not admit any act of personal bribery.

Counsel for the petitioner then stated he would not press the charges of personal bribery, and would accept the avoidance of the election.

SPRAGGE, C.—The case at present does not show any personal act of corrupt practice on the part of the respondent. If I thought it did, I should feel it my duty so to adjudicate, whether the petitioner was willing to withdraw his charge on that head or not. But the question of costs still remains to be settled.

Mr. Bethune contended that as far as the preliminary objection is concerned, there was ground for the inquiry, as it was proved in Brockville, by petitioner's own evidence, that there had been spent of his and his partner's money about $3,600, making an average of $6 for each vote cast for petitioner. The Election Court at Toronto have acted on the rule of giving no costs to either party in interlocutory proceedings, as the law was unsettled in this respect. On these grounds he asked that each party should pay their own costs of the preliminary objection.

Mr. McCarthy contended the inquiry at Brockville was not concluded, and it was not known whether the charges against the petitioner were true or false. It would be contrary to every principle to assume the petitioner guilty before the investigation was determined, and in effect to punish him as in the way the respondent asks, by depriving him of his costs. But had the investigation closed, and petitioner's status not been affected, he would, of course, have been entitled to his costs. It was not prosecuted, because the respondent discovered, after setting

up the preliminary objection, that as a matter of law, even if true in fact, it was insufficient. It would be an extraordinary result, that a party pleading, as it were, a special defence, which he admitted was bad in law, and which had not been proved in fact, should be relieved from the costs of the proceedings. According to the *Southampton case* (1 O'M. & H. 221 to 225), it appears that the successful establishment of a recriminatory case does not debar the petitioner, even when he is the candidate, from prosecuting the petition so far as unseating the sitting member, but only prevented the unsuccessful candidate from being seated, and here the seat was not claimed.

SPRAGGE, C.—It is conceded by the learned counsel for the respondent, that as to the general costs there is nothing to take the case out of the ordinary rule, that the costs follow the event; but he contends that an exception should be made in regard to the costs of the inquiry which took place upon the preliminary objection of the respondent, that the status of the petitioner was annihilated by reason of his being guilty, as was alleged, of personal bribery. It is conceded now that this preliminary objection was untenable as a matter of law, but it is urged that this was an unsettled point when the exception was taken and the inquiry had, and that the evidence showed that there was probable ground for the objection.

The evidence was taken before me, and having the evidence here, and having again read it over, it appears from it certainly that the expenditure of money by the petitioner and his agents was very considerable—so considerable as to leave room for the suspicion that it was not all expended for the legitimate purposes of the election. But what was charged went beyond this—it was a charge of personal wrong on the part of the petitioner, which, however, was not established.

There have been cases where the usual rules have been departed from, but these cases, however, are few, and the

general rule is now rarely departed from, unless under very exceptional circumstances. In this case, at any rate, they do not appear to apply, and never have been applied to such a case as this.

These costs have been incurred in an inquiry, not upon the merits of the petition, but at the instance of the respondent to intercept an investigation into the merits of the petition on the ground of demerit in the individual by whom the petition was presented, and it is now conceded that the petitioner rightly succeeds.

This is not a case, apart from the question of law, in which a party can properly claim exemption from the general rule. I do not say what might have been the case if a clear case of personal bribery had been made out against the petitioner. It might have been proper to refuse him costs in that case, but such a case has not been made out. The preliminary objection was wrong in point of law. Its purpose to intercept inquiry does not commend it as a proper proceeding, and it was deficient in proof of the fact alleged.

My opinion, therefore, is that these costs should not be excepted from the general costs to be paid by the respondent.

(9 *Commons Journal*, 1875, p. 4.)

LONDON.

BEFORE CHIEF JUSTICE HAGARTY.

LONDON, *7th to 10th September, 1874.*

GEORGE PRITCHARD, *Petitioner*, v. JOHN WALKER, *Respondent.*

Excessive expenditure—Bribery—Circumstantial evidence—Respondent's disclaimer of corrupt practices—Agency—Appeal—37 Vic., c. 10, s. 35—Disqualification of respondent.

The evidence showed that extensive bribery was practised by the agents of the respondent and by a large number of persons in his interest, but no acts of personal bribery were proved against him, and he denied all knowledge of such acts. It was in evidence that he had warned his friends, during the canvass, not to spend money illegally.

The Judge (*dubitante*) held that no corrupt practice had been committed with the respondent's knowledge or consent, and avoided the election for corrupt practices by the respondent's agents.

On appeal to the Court of Common Pleas, it was

Held, 1. that the circumstantial evidence in this case was sufficient to show that corrupt practices had been committed by the respondent's agents with his knowledge and consent.

2. That wilful intentional ignorance is the same as actual knowledge.

3. That the assent of a candidate to the corrupt acts of his agents may be assumed from his non-interference or non-objection when he has the opportunity. And such candidate's knowledge of and assent to the corrupt acts of his agents, may be established without connecting him with any particular act of bribery. (24 C. P. 434.)

The petition contained the usual charges of corrupt practices.

Mr. Robinson, Q.C., *and Mr. Street*, for petitioner.

Mr. R. A. Harrison, Q.C., *and Mr. A. F. Campbell*, for respondent.

The evidence disclosed that about $9,000 were expended by the respondent and his agents at the election. The total vote was 2,477, of which the respondent received 1,269, and Mr. Carling 1,208. The facts of the case are set out in the judgment of Hagarty, C. J., reported in 10 *Canada Law Journal* (1874), p. 281; and in 9 *Commons Journal*, p. 24.

At the close of the evidence, and after the argument of counsel,

The CHIEF JUSTICE declared the election void on the ground of bribery by agents of the respondent, but *(dubitante)* without his knowledge or consent; and he reported that corrupt practices had extensively prevailed at the election.

From the above judgment the petitioner appealed to the Court of Common Pleas under the 37 Vic., c. 10, s. 35, on the ground that upon the law and evidence the learned Judge should have declared the respondent guilty of corrupt practices, and should have found that corrupt practices had been proved to have been committed by and with the knowledge and consent of the said respondent at the said election. The respondent filed a cross appeal.

The COURT held that the circumstantial evidence set out in the case was sufficient to show that corrupt practices had been committed by the agents of the respondent and with his knowledge and consent, notwithstanding his disclaimer. That wilful intentional ignorance is the same as actual knowledge. That the assent of a candidate to the corrupt acts of his agents may be assumed from his non-interference or non-objection when he has the opportunity, and that it is sufficient to establish such candidate's knowledge of and assent to the fact that his agents used bribery to procure his election without connecting him with any particular act of bribery.

The judgment of the Court is reported in 24 C. P., 434.

(9 *Commons Journal*, 1875, p. 24.)

WEST NORTHUMBERLAND.

BEFORE CHANCELLOR SPRAGGE.

COBOURG, *25th and 26th September, 1874.*

WILLIAM LEMUEL BURNHAM *et al., Petitioners,* v. WILLIAM KERR, *Respondent.*

Respondent's admission of corrupt practices by agents—Inquisitorial proceedings—Costs.

The respondent, a week before the trial, served a notice on the petitioner admitting bribery by one of his agents, and notifying the petitioner not to incur further costs. At the trial the respondent, pursuant to the notice, gave evidence of bribery by an agent, which the Court held sufficient to avoid the election. The petitioner then contended that he had a right to show that corrupt practices had extensively prevailed, and that the respondent had been personally guilty of corrupt practices.

Held, that the functions of the Court were judicial and not inquisitorial, and that no further evidence should be received on the issue as to the avoidance of the election on account of bribery by agents. But if incidentally it should appear, in the inquiry as to the personal charges against the respondent, that corrupt practices extensively prevailed, the same would be certified in the report to the Speaker.

The petitioners then examined witnesses on the personal charges, which were not proved, and in determining the question of costs, it was

Held, that as the petitioners might have come to court on the notice served by the respondent, and have asked to have the election set aside, and as they had attempted, but had failed, to establish the personal charges, the respondent should only pay such costs as he would have had to pay had the petitioners accepted the notice served upon them before the trial.

The petition contained the usual charges of corrupt practices. Particulars were served by petitioners of over one hundred personal charges against respondent. Prior to the trial, and on the 19th September, the respondent caused the following notice to be served on the petitioners' solicitors:

"Take notice, that on the trial of this petition, the respondent will admit the following facts, that is to say: That a person who, according to the common law of England in reference to the election of members of Parliament, would be held to be an agent of the respondent at the said election, did, before the said election, give a sum of money to a voter to induce him to vote for the respondent, but that this was done without the knowledge and consent of the respondent.

"And further take notice, that in so far as the petitioners seek to void the said election on account of the acts of agents of the respondent, the respondent will, if the petitioners incur any further expense or protract the trial of the said petition in so far as corrupt practices by agents are concerned, ask that the petitioners pay any costs which may hereafter be incurred.

"And further take notice, that the respondent is ready and willing, and hereby offers, to cause to be served, at his expense, notices of countermand of the subpœnas served upon witnesses in so far as corrupt practices by agents is concerned, in order that the conduct money paid to the said witnesses may be returned by them to the petitioners, and in default of the petitioners countermanding the services of the said subpœnas, the respondent will claim to be relieved of the expense of the attendance of the said witnesses at the trial of the said petition.

"And further take notice, that the respondent denies that he was personally guilty of any corrupt practice whatever at, before, or after the said election, or that any corrupt practice was committed at, before, or after the said election on his behalf by or with his knowledge and consent.

"And take notice, that if the petitioners further insist upon the said charges of personal corrupt practices against the respondent, the respondent will at the trial claim to be relieved from the payment of the costs of the petition, which may be incurred in consequence of the petitioners further pressing the said charges."

The petitioners served no counter notice, but proceeded to trial.

Dr. McMichael, Q.C., for petitioners.

Mr. Bethune for respondent.

At the opening of the court, counsel for the respondent proved service of the notice, and contended that after the notice it was not necessary the petitioners to pro-

ceed further, as the Court would not act as a court of inquisition; and this notice was equivalent to the withdrawal of the plea in a *Nisi Prius* record, or of the answer of a defendant in Chancery. He referred to the *Southampton case* (1 O'M. & H. 227); Rogers on Elections, 12th Ed., p. 355; *Glengarry case* (*ante*, p. 8); Brough on Elections, 20; *Guilford case* (1 O'M. & H. 15); Leigh & Le Marchant, 123. He admitted the election was void on account of bribery by an agent without the knowledge of the respondent.

The CHANCELLOR: I will require evidence of the particular case of bribery by the agent.

The respondent then called a witness who was admitted to be an agent of the respondent, and who proved an act of bribery.

The CHANCELLOR held that sufficient evidence had been given, and that the election must be declared void.

Dr. McMichael, for the petitioners, contended that under 36 Vic., c. 28, s. 20, he should be allowed to give evidence that corrupt practices extensively prevailed at the election. The petition so states, and in the interests of public morality and public policy the petitioners should be allowed to go on and have a full inquiry.

The CHANCELLOR ruled that he would follow the decisions of Willes, J., in the *Windsor case* (1 O'M. & H. 6), *Guilford case* (*ibid.* 15), and *Southampton case* (*ibid* 227); and Grove, J., in the *Taunton case* (2 O'M. & H 74), and *Wakefield case* (*ibid.* 103). The functions of the Court are judicial and not inquisitorial; and any evidence to try the issues would be received, but not in any way contrary to the rulings of the learned Judges referred to. If incidentally, in the course of the inquiry as to the personal charges, it appeared that corrupt practices had extensively prevailed at the election, he would certify that fact in his report to the Speaker.

The personal charges against the respondent were then proceeded with—the petitioners examining 36 witnesses in support of the charges. After the argument of counsel, the following judgment was delivered.

SPRAGGE, C.—The case involved among other things serious charges against the respondent, and may be divided into three branches. 1st. A charge that there had been such bribery by agents without the knowledge of the respondent as would void the election. 2nd. Such corrupt practices as, under sec. 18 of the Act of 1873, would disqualify the respondent personally. 3rd. Extensive corrupt practices, which should be certified under sec. 20, sub-sec. *c*. As to this latter point I am unable to certify on the evidence before me that extensive corrupt practices had prevailed, under sub-sec. *c*. of sec. 20 of the Act of 1873.

With reference to the first branch, I consider the notice given by the respondent on the 19th of September was sufficient to render it unnecessary for the petitioner to prove a case merely for avoiding the election. It was put in a technical form and couched in the language used by judges in similar cases. If the petitioners sought nothing more than to avoid the election, they were safe in coming into court without further evidence. When the point of going farther was raised it was a new one, but I considered that the cases had decided that the Court was not one of inquisition. This was not a question between the parties—it was a question of public policy for the discretion of the Court. I had asked, when the matter was pressed upon me, *cui bono?* In the English cases the Judges decided whether they would or would not go further after the issue was proved. The language of the Act of 1873 showed that the Legislature here had also made a distinction. Besides, it is not apparent that it would be wise or right to go into the inquiry. There was no grievance to the petitioners; it is no more their affair than that of the rest of the Province.

The other question remained as to the personal charges sought to be fastened upon the respondent. It was not attempted to be denied that on this ground the petitioners had a right to go into all the facts to establish their case; and if in doing so evidence of extensive bribery had incidentally transpired so as to require a certificate under sec. 20, sub-sec. *c*, I would have so certified. In the *Cornwall case* (*ante*., p. 547), I decided not to certify, and I still consider that I decided rightly. The *Taunton case* (2 O'M. & H. 74) also supported this view.

Then as to the personal charges, it was alleged that there had been such extensive bribery that the respondent either must have known of it or wilfully closed his eyes to it. About $1,600, not more than $1,700, appeared by the evidence to have been spent. This by tacit consent was placed in the hands of a gentleman, and he, wisely or unwisely, had hid the amount from the respondent. It was said that the expenditure had been legitimate. Even if the respondent had known of it, it was necessary to prove that it could not, from its amount or otherwise, have been used legitimately. There was not a tittle of evidence to that effect. But it was not necessary to go so far, as the respondent did not know of the amount. If it had been shown that the amount had been so large that the expenditure must have been corrupt, and that the respondent, if he had known it, must have wilfully shut his eyes to the facts, I would have been disposed to hold the respondent responsible; but the facts did not call for that. It was not brought home to the respondent that he knew of more than his own $250 and his brother's $300, and that it was likely a further contribution would be made. This was far short of the evidence required to make the respondent personally liable.

Next, as to the other personal charges. Mr. Lachlan's case would have been serious if it could have been supported; but, as Dr. McMichael frankly admitted, it could not. The demeanor of the witness, his unsatisfactory

replies, and the flat contradiction by others of material parts of his evidence, prevent his case having any weight.

As to cases of this nature, I may remark that it would be wise in candidates to refuse to have anything to say to the voters during elections about money matters. There is a tendency during elections to press doubtful claims for settlement. The Court should be satisfied in such cases clearly. Logically, perhaps, if a case were proved, the consequences would follow as stated in the Act; but the Courts do draw a distinction and hesitate longer where the consequences were serious.

I must therefore adjudge that the personal charges have not been proved in such a way as to justify me in reporting them as established. As to what might have been proved, I can only gather that there were cases of suspicion and of bribery incidentally revealed. The respondent at the beginning of the trial admitted one case of bribery by an agent.

This was a law absolutely necessary to be passed. The practice of bribery prevailed throughout the country to a great extent. It was a demoralizing practice to the briber, the person bribed, the constituency, and the candidates. The effect might be, if permitted, to place rich and dishonest men in Parliament, to the exclusion of the honest poorer men. It was a great public wrong and in derogation of the franchise, which had been termed a public trust.

As to costs. The petitioners might have come to court on the notice served by the respondent, and asked to have the election set aside. They did not choose to do so; they went into evidence, but have failed to establish their personal charges against the respondent. They have established cases of suspicion or of imprudence. The costs of this attempt, which is a failure, should not fall upon the respondent. The respondent should pay the costs which he would have had to pay if the petitioners

had taken the course indicated. There should be no costs to the respondent against the petitioners.

(9 *Commons Journal*, 1875, p. 7.)

NIAGARA.

BEFORE CHIEF JUSTICE HAGARTY.

NIAGARA, *20th to 22nd October, 1874.*

NEIL BLACK *et al.*, *Petitioners*, v. JOSIAH BURR PLUMB, *Respondent.*

Excessive expenditure—Respondent's disclaimer of corrupt practices—Bribery—Agents—Sub-Agents—Costs.

The respondent, in a constituency where 642 persons voted, received 336 votes, and his election expenses were about $2,000. The money was entrusted by the respondent to one G., with a caution to see that it was used for lawful purposes only. About $1,200 of this money was given by G. to one W., who distributed it to several persons in sums of $40, $100, $200 and $250. No instructions as to expenditure were given by G. to W., or by W. to the persons amongst whom he distributed the money; and by the latter several acts of bribery were committed. The respondent publicly and privately disclaimed any intention of sanctioning any illegal expenditure; but made no inquiries after the election as to how the money had been spent until a week or two before the election trial. He denied any act of bribery, direct or indirect, or any knowledge thereof; and no proof was given of a personal knowledge on his part of any of the specific wrongful acts or payments proved to have been committed by the persons amongst whom his money had been distributed.

Held, 1. That under the peculiar circumstances of the respondent's canvass, and on a review of the whole evidence, the respondent's emphatic denial of any corrupt motive or intention should be accepted.

2. That the persons amongst whom the respondent's moneys had been distributed by W., and persons acting under them, were sub-agents of respondent, and that their corrupt acts avoided the election.

Semble, that no limit can be placed to the number of parties through whom the sub-agency may extend.

The election was set aside with costs, except as to the costs of certain charges which were unwarranted. A party, though successful, is not entitled to the costs of all the witnesses he may subpœna, nor is the fact of them being called or not called the test of such costs being taxable.

The petition contained the usual charges of corrupt practices.

The total vote at the election was 642, of which the respondent received 336, and Mr. John M. Currie 306. The material facts disclosed at the trial are set out in the judgment.

Mr. Hodgins, Q.C., *and Mr. Currie*, for petitioner.
Mr. Robinson, Q.C., *and Mr. O'Brien*, for respondent.

HAGARTY, C. J., C. P.—This constituency consists of the town and township of Niagara. Six hundred and forty-two persons voted, and the respondent had a majority of thirty. The respondent agreed to come forward on the 12th January; the polling took place on the 29th of January, 1874. The respondent is chairman of the Steel Works Company, of which Mr. Gunn is secretary and acts as local treasurer. Gunn was appointed on the 1st of January, and only came to reside in Niagara on the 15th of January last. There is no bank agency or express office in Niagara.

On January 26th the respondent sent Gunn to Toronto with a letter to Mr. Gzowski, a stockholder and director of the company. The respondent told Gunn that money would be wanted for the general purposes of the election, and also for his own purposes and for the Steel Works. He had men then at work on his own premises. Gunn presented the letter to Mr. Gzowski, who went with him to the Montreal Bank and spoke to the manager, who then gave Gunn $1,992.50, and he informed respondent thereof. The latter authorized Gunn to disburse money required for the election, cautioning him distinctly to see that none of the money was used for anything but perfectly lawful purposes, and on several subsequent occasions said the same thing.

The respondent was very busy about the election, and nothing whatever seems to have taken place between them as to the subsequent expenditure. Gunn knew hardly any one in Niagara, and next day, at the suggestion of one Burke and others, handed $1,200 of this money

to Dr. Wilson, a well-known physician here and respondent's medical adviser, thinking he was the proper person to deposit it with for lawful expenses, taking no receipt. Gunn says he had no idea or intention that the money should be improperly spent. He afterwards paid several hundred dollars more for various expenses—printing, and some very heavy livery bills. He gave $100 back to respondent, and after paying all the calls upon him, had a balance of over $100 on hand, which he applied to other matters not connected with the election.

Dr. Wilson admits the receipt of this money, understanding that it was to be used for election purposes, not unlawfully; and he says he does not know whose money it was. The doctor sent $250 of this money to one Lowry, in the St. David's division, sending it in an envelope by one Murphy, without any letter or message, simply addressed to Lowry. Murphy swears he gave it to Lowry, not knowing there was money in it. Wilson also gave $250 to Thomas Hiscott, in the division of Virgil, without any instructions; and also $200 to Longhurst, in the remaining (Queenston) division. He also paid $100 to Thomas Burke, $40 to J. T. Kerby, for expenses, and small sums to others. One Kennell, a non-elector, was paid $100 for services, and Wilson returned $28 or $29 to Gunn.

Dr. Wilson says he did not intend to use the money for improper purposes, as he is opposed to such. He thought the parties to whom he paid it were responsible persons. He gave no instructions to the persons to whom he gave the money how they were to use it, nor did he ask how it was used. With the money so received, Longhurst, as his evidence shows, committed several clear acts of bribery and disposed of some of the money in a most suspicious way, giving his nephew, a voter, $60 of it, telling him to do as he liked with it, meaning about the election; and $70 to another man, much in the same way, never asking any account of it.

Out of this $250 given to Lowry he returns $65. He says he paid one Stuart after the election, for lawful expenses, horse hire, lights and fuel, $130, but he can tell nothing about whether the claim was real or false, or anything about this man Stuart. Lowry, in my judgment, committed at least one act amounting to bribery in Mrs. Hanniwell's case.

In the third case, that of the money given to Hiscott, for the Virgil division, one Walter Thompson says that he found $250 in an open box in his stable. Just before he saw Hiscott standing in the road, and no doubt the latter placed it there. This money Thompson divided among five or six people the night before the polling, telling them to go to work at once. He made no inquiry how it was spent, nor was any attempt made to prove that it was spent honestly.

Bribery was also committed by Robert Best to the extent of $40, but I do not consider that the respondent was in any way affected by it.

The respondent was examined and gave a full account of his candidature. He said from the beginning he was determined to make or sanction no illegal expenditure, and repeatedly announced this, his resolution, both publicly and privately (in this he is fully corroborated); that this was his first experience in elections, and he had no idea of the costs. There were certain charges made against him as to transactions in Albany, which he found it absolutely necessary to refute publicly before the electors, and in the short space before the polling he spent three days in the United States getting evidence, and had to spend a great deal in printing. There was no local paper or printing office, which caused more expense. His whole expenses, he said, were between $2,000 and $2,100, $1,800 being spent through Gunn. He himself paid a St. Catharines paper for printing in April last $100, a shorthand reporter $50, and necessary telegraphing from $75 to $100. His personal expenses were under $5.

He denied any act of bribery, direct or indirect, or any knowledge thereof, and as to treating, he only spent 70 or 80 cents, and that I think was not for any purpose or motive connected with the election. No attempt was made to prove any personal knowledge on his part of any of the specific wrongful acts or payments. He says that until quite lately, in fact the last week or two, he did not believe the petition would be proceeded with, and never, till he found it was really coming to trial, did he make any inquiry as to the charges. He and Gunn both state that it was only within this period that he was made aware how Gunn had disposed of his money. He never suspected or knew that these sums were paid to Dr. Wilson, or disposed of by him as proved. He accounts for his ignorance by stating that he had perfect confidence in Gunn's intelligence and integrity, and having given Gunn explicit instructions not to spend any money illegally, he did not think that anything was wrong; that his cash transactions were very large, and that his general habit was not to close up or balance his accounts till the end of each year, and so he had not yet examined how the cash stood with Gunn. When he discovered the amount that had actually been expended he says he was much surprised, and thought it was altogether too large.

I think the respondent, under the peculiar circumstances of his canvass, has satisfactorily accounted for his not having personally superintended Gunn's expenditure during the election.

On a review of the whole evidence, I see no reason to doubt the respondent's very emphatic denial of any corrupt motive or intention. I accept his declaration that he entered into the contest intending to spend no money illegally, and that he was in no way cognizant of any illegal act.

It remains to be considered whether his election is to be avoided for the undoubtedly corrupt acts of some of his friends.

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Assuming for argument's sake that neither Gunn nor Wilson actually intended to violate the law, I cannot conceive how they could have taken any course so calculated to arouse suspicion, and to make what they say was meant to be right appear to be wrong, as the course they did adopt. The respondent trusts Gunn with the disbursing of his moneys. The latter, on somebody's suggestion, hands $1,200 of it to Dr. Wilson in the vaguest manner, giving no directions, and never inquiring as to its employment. If he made Wilson the paymaster, it is not easy to see why he did not refer parties coming with claims for lawful expenses to Wilson. He paid them himself, without inquiring whether the large sum given to Wilson was or was not exhausted. He never asked for an account from Wilson, but let him do as he pleased. I look upon the relation of both Gunn and Wilson to the respondent in the same light, and I think the latter is as clearly responsible for what Wilson did as if Gunn had done the same act—when Wilson gives to Longhurst (for example) $200 to use as he might please, about the election, of course in the promotion of respondent's interests. With part of this money Longhurst commits several clear acts of bribery.

My strong impression is that the agency continues under these circumstances, and the respondent's election must be affected thereby. The same might be said in Lowry's case and in Hiscott's, whom Dr. Wilson was pleased to trust with $250 for the Virgil division, to be expended as he pleased. The placing of it in Thompson's stable, to be found by the latter, can hardly be referable to a transaction intended to be honest; and the subsequent distribution of it by Thompson raises the gravest suspicion that the whole proceeding was intended to be an evasion of the law, and resulted in an illegal expenditure.

If I do not hold the agency to continue in this case, I think I would be, as far as in me lies, rendering a wholesome law inoperative, and opening a wide door to corrupt acts.

The *Bewdley case* (1 O'M. & H. 18), I think, strongly supports this view. Sir Colin Blackburn's judgment is very explicit. There the respondent deposited a large sum in the hands of one Pardoe, directing him in his letter to apply the money honestly, but not exercising, either personally or otherwise, any control over the manner in which this money was spent, etc.; not, in fact, knowing how it was spent. He then says: "I can come to no other conclusion than that the respondent made Pardoe his agent for the election, to almost the fullest extent to which agency can be given. A person proved to be an agent to this extent is not only himself an agent for the candidate, but also makes those agents whom he employs. . . . An agent employed so extensively as is shown here makes the candidate responsible not only for his own acts, but also for the acts of those whom he, the agent, did so employ, even though they are persons whom the candidate might not know, or be brought into personal contact with. The analogy that I put in the course of the case is a strong one; I mean that of the liability of the sheriff for the under-sheriff, when he is not merely responsible for the acts which he himself has done, but also for the acts of those whom the under-sheriff employs; and not only responsible for the acts done by virtue of the mandate, but also for the acts done under color of the mandate, matters which have been carried very far indeed in relation to the sheriff." I think these principles must govern this case.

I do not think that bribery prevailed extensively; most likely large portions of the money proved to have been paid to certain individuals did not go beyond the payees.

I shall report that the respondent was not duly elected and that his election is void, and that he must pay the costs of the petition; that no corrupt practices took place with his assent or knowledge; and that corrupt acts were committed by William Longhurst, David Lowry and Robert Best. I am inclined to look leniently on the

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loans made by Best. He very frankly told his story, and honestly put the worst construction on what he did, although many others would probably have insisted it was all right. After much consideration, I have decided not to report Walter Thompson or Murray Fields, but I think the disposition of the money they received was most reprehensible.

It was urged upon me by Mr. Robinson that I should make some special order as to the costs of certain witnesses said to have been subpœnaed to be in court, but who were not called by the petitioners. I do not see that I have any material before me to warrant my making any order now beyond directing, as I do direct, that no costs be allowed petitioners for any witnesses summoned or in attendance, respecting any charge of undue influence, threatening with loss of office, salary or income, or the opening or supporting houses of entertainment for the accommodation or treating of electors, as I consider that the case disclosed no such practice, and that such charges were unwarranted. In my view of the law, I think it is in the province of the taxing master, after hearing both parties, to decide what witnesses to allow or disallow. Such is his duty, I think, in ordinary cases. It does not follow because a party is successful and entitled to the general costs of the cause, that he is entitled to the costs of all the witnesses he may subpœna; nor is the fact of their being called, or not called, the test of their being reasonably taxable.

I cannot conclude without expressing my strong sense of the admirable manner in which the case has been conducted on both sides, and the total absence of all irrelevant statements, and of any undue waste of the public time.

(9 *Commons Journal*, 1875, p. 78.)

SOUTH HURON.

BEFORE MR. JUSTICE GALT.

GODERICH, *20th and 21st October, 1874.*

DAVID HOOD RITCHIE, *Petitioner*, v. MALCOLM COLIN CAMERON, *Respondent.*

Excessive expenditure—Subscriptions to churches—Appeal from Election Judge—Conflicting evidence—Costs.

The respondent was charged with using means of corruption at his election (1) by giving up a promissory note and also $20 to one M., on condition of M. and his sons voting for him; the charge depended upon the contradictory oaths of M. and the respondent; (2) by giving a large subscription to an election fund, some of which was expended for illegal purposes; and (3) by subscriptions to churches. The respondent denied any corrupt motive in these subscriptions. The Election Judge, on the evidence, found that the respondent was not personally guilty of corrupt practices, but he avoided the election on the ground of bribery by agents.

From the judgment on the personal charges the petitioner appealed; but the Court, on a review of the evidence, declined to set aside the finding of the Election Judge. The appeal was dismissed without costs, as there were strong grounds for presenting it.

Per Hagarty, C. J.—Candidates and agents should select less suspicious seasons than election times for exercising their liberality towards charitable and religious objects. (24 C. P. 488).

The petition contained the usual charges of corrupt practices.

Mr. R. A. Harrison, Q.C., for petitioner.
Mr. Bethune for respondent.

Evidence was given of bribery by agents, and of subscriptions to an election fund and to churches by the respondent. The principal facts of the case are set ou in the report of the case in the appeal to the Court of Common Pleas, 24 C. P. 488.

At the close of the evidence, judgment was given as follows:

GALT, J.—I declare the election void on the ground of bribery by agents. I find that the respondent was not himself guilty of corrupt practices. I order the respondent to pay the costs of the petitioners.

The petitioner appealed to the Court of Common Pleas against the finding on the personal charges, on the ground that the respondent had used means of corruption, and had been guilty of corrupt practices by giving money, and making promises of same, and by subscribing money to churches and colleges with intent to corrupt or bribe electors to vote for him, or to procure his election.

The COURT, while intimating that had the finding of the learned Judge been otherwise it would not have interfered, declined to set aside the judgment of the Election Judge, and dismissed the appeal without costs, as the petitioner had strong grounds for presenting the appeal.

(9 *Commons Journal*, 1875, p. 30.)

EAST NORTHUMBERLAND.

BEFORE CHIEF JUSTICE HAGARTY.

COBOURG, *27th October, 1874.*

ROBERT GIBSON, *Petitioner*, v. JAMES LYONS BIGGAR, *Respondent.*

Committees—Agency—Bribery—Particulars—Costs.

The respondent nominated no committees to promote his election; but he was aware that committees were acting for him in each municipality. On one occasion he went to the door of one of the committee rooms, and left some printed bills to be distributed. One P., who attended the meetings of this committee, and who said he was considered on the committee, committed an act of bribery.

Held, that the committee were agents of the respondent, that P. was a member of the committee; and an act of bribery having been committed by him, the election was avoided.

The particulars not having been properly prepared, the petitioner, while obtaining the costs of the proceedings, was disallowed the costs of the particulars.

The petition contained the usual charges of corrupt practices.

Mr. John D. Armour, Q.C., for petitioner.

Mr. Hodgins, Q.C., *and Mr. C. R. W. Biggar*, for respondent.

The case turned upon the question whether self-organized committees for promoting the election of the respondent were his agents or were volunteers. *Staleybridge case* (1 O'M. & H. 67); *Westminster case* (*ibid.* 91). The evidence on the point was as follows:

Respondent: I nominated no committees, but I understood committees were nominated. I suppose there was a committee in each municipality. I once went to the door of the committee-room for Brighton village, and left some printed bills to be circulated. Phayre, of Brighton, was a supporter of mine. I cannot say I saw anyone there but John Proctor, Kemp, and, I think, Ketchum. I never attended any committee. At former elections the committees were appointed by the Reform Association. It acted on its own motion. I had no control over it. The convention that nominated the candidate took upon itself to name committees. I assume they did so. I had nothing to do with them. I paid no expenses of any committees.

Ira B. Phayre: I was one of the persons who met at the Brighton committee-room. I did not see the respondent when he came to the committee-room. I don't know who were appointed on the committee; I believe I was considered on the committee. I was at the room nearly every evening. We had voters' lists, and it was placarded as a committee-room working for respondent.

HAGARTY, C. J.—I must assume from the respondent's own statement that he was aware of an organization in each municipality, acting in the character of a committee for him. As to the Brighton committee, the evidence is strong. The room was placarded as a committee-room. The respondent went there on one occasion. Mr. Phayre had visited it constantly; it was known to everyone as the respondent's committee-room, and the respondent was aware of some organization working for him in Brighton. I think agency in Phayre is proved; and an act of bribery having been committed by him, the election is void.

The respondent must pay the petitioner's costs; but owing to the cloudy manner in which the particulars have been prepared, I disallow so much of the petitioner's costs as have been incurred in obtaining, amending, briefing and placing the particulars on the record.

(9 *Commons Journal*, 1875, p. 11.)

CENTRE WELLINGTON.

Before Chief Justice Hagarty.

Guelph, 3rd and 4th November, 1874.

John Ironside *et al.*, *Petitioners*, v. George Turner Orton, *Respondent.*

Bribery by Agents—Charge against respondent—Conflicting evidence.

The respondent was charged with corrupt practices, in that, when canvassing one C., a voter who said he would not vote unless he was paid, he said he was not in a position to pay him anything, but that if C. would support him, one of his (the respondent's) friends would come and see about it. The respondent, as he was leaving the voter's house, met one K., a supporter, who, after some conversation, went into C.'s house and gave him $5 to vote for the respondent. The charge depended upon the evidence of the voter C. and his wife. The respondent denied making such a promise; and he was sustained by K. as to a conversation outside C.'s house, in which the respondent cautioned K. not to give or promise C. any money. The Election Judge on the evidence found that the respondent was not personally implicated in the bribery of the voter C. by K.

Before an Election Judge finds a respondent or any other person guilty of a corrupt practice involving a personal disability, he ought to be free from reasonable doubt.

The petition contained the usual charges of corrupt practices, and claimed the seat for Robert McKim, the defeated candidate, on a scrutiny of votes.

Mr. Bethune and Mr. Guthrie for petitioners.
Mr. Drew for respondent.

Evidence was given of acts of bribery committed by the parties named in the judgment; and at the close of the evidence on the first day, counsel for the respondent admitted that sufficient evidence had been given to avoid the election. Evidence was then given on the personal

charges against the respondent as set out in the judgment. At the commencement of the trial the claim for the seat was abandoned by consent of both parties.

HAGARTY, C. J.—I find that several acts of bribery were committed beyond question, and it was properly conceded by the respondent's counsel that the election must be set aside.

It remains to be seen whether the evidence brings home to the respondent a personal knowledge or assent to any corrupt practices. The only portion of evidence in this head requiring to be considered is that given by Campbell and his wife.

According to the petitioner's view the respondent canvassed Campbell, and finding the man's vote was professedly for sale, he said to him that he (the respondent) was not in a position to pay him anything, but that if Campbell would promise to support him, he would see that one of his friends would come and see about it. His wife, who was in bed, says that she didn't hear all the conversation, but heard the man ask for the vote, and say that if Campbell supported him, some of his friends would call and see him.

If I can be satisfied that this took place, I must hold that this was an offer to bribe, and such as I think would prove the respondent guilty of a corrupt practice. Campbell says that he saw the two sleighs on the road, and that after the respondent had returned, Kelly came up to his house, came in and gave him $5, telling him to be up early at the poll to vote, and to come with Dunlop. He then watched from the window, saw Kelly go down to the road and the two sleighs drive off together, the respondent's sleigh going first or in front.

Now, in such a statement of facts, the case against the respondent would seem complete. A corrupt offer, a friend to come and do what the respondent could not do personally, the latter going down to the road, the friend coming up and giving the bribe, the respondent watching

till the friend returns, and the whole party—principal and agent—going away together.

Against this the respondent swears very positively that he never made such an offer or promise; that Campbell told him in effect that his vote was for sale; that he told him that he ought to be ashamed to say so, and again pressed him to vote or promise to vote for him, which Campbell declined to do; that finally respondent told him to think over it, that some of his friends would be coming that morning to the poll and could bring him with them, and that the respondent would be much obliged to him if he voted for him. I think that it is very clearly proved in the oaths of the respondent, Kelly and Snider, that the parties in the sleighs did not go away together, but that the respondent and Snider drove off before Kelly went up to Campbell's house, and that when Kelly came away the former were not on the road. I can hardly consider the discrepancy unimportant, as it negatives one serious aspect of the case, the waiting for Kelly's return and the departure together.

As to what took place on the road, the respondent came down from the house, saying that Campbell wanted money and he couldn't give it. He intimates he thought that perhaps Kelly, who was an impulsive man, might go up to Campbell, and therefore he warned him not to give him any money or promise anything to Campbell, and having said this, he did not think that Kelly would have gone to the house, and he drove off, not thinking that he would do so, and not knowing that Kelly had gone there. Kelly swears that he did not go there in consequence of anything said by the respondent; and they both say that it was only yesterday that the respondent first knew that Kelly had given money to Campbell. What took place on the road might have occurred without any corrupt practice or idea on the respondent's part. He tells his friends that Campbell's vote is offered for sale, but that he refused to promise or give anything, and told his friends to follow his example. If one of them, hearing

this, chose to go and purchase without the respondent's knowledge or assent, the latter could not be held personally liable. I do not see my way to holding that the transaction took place with his knowledge or assent when the only two persons who knew how it really was swear positively that it was not so. Everything must therefore turn on what took place in the house. If the respondent said what is imputed to him he certainly acted with the most startling folly, laying himself wholly in the power and at the mercy of a man of whom he previously had known nothing, and who on his first acquaintance showed himself to be utterly venal and ready to be sold to the highest bidder. Nothing has come out in evidence to induce me to think that in his general conduct of his canvass he acted with imprudence or with any indifference to the violation of the law. The little that appears as to his general conduct raises the idea that he was generally announcing his intention to spend no money. I, of course, don't place much reliance in such general declaration, but when the case, as here, rests on one transaction, I cannot avoid considering the whole aspect of the canvass as shown in the evidence.

It is needless to say that the conduct of Campbell was not such as to impress one favorably. Even the man who might take money for his vote might possibly shrink from taking the course he did if his idea was to lay a trap for the respondent. In addition, the latter waiting for Kelly and the simultaneous departure would play an important part in any account of the transaction. It is urged that he is directly corroborated by his wife. The latter heard only part of the conversation of what the respondent said—and he swears he did say something—about some of his friends taking Campbell to the poll in the morning, and she might easily in good faith have accepted her husband's version of it as that which she had heard.

Had the matter rested solely on Campbell's oath as opposed by the respondent's, I would act as I have already

done in similar trials, and hold the charge not proven. I am told that with the wife's statement the weight of evidence preponderates against the respondent. I appreciate the force of this argument, and have given it all the consideration in my power.

I think, before I find the respondent or any other man guilty of a corrupt practice involving a personal disability, to say nothing of the effect of it on character, I ought to be free from reasonable doubt. I have the heavy task imposed on me to pronounce upon his guilt or innocence, and I am bound, both personally and judicially, not to condemn until my conviction is clear and unhesitating. I feel bound to say that I entertain the gravest doubts as to whether I can venture to place implicit truth in Campbell's statement. On the contrary, I think its accuracy is open to serious question. It is not necessary that I say it seems to me a mere fabrication, even if I think so. It is sufficient if I think it too doubtful to be relied upon to warrant the condemnation of another. If I err, as I have no doubt many persons who feel keenly in contests of this character may think I do, it is better that it should be on what is significantly called the safe side.

I had occasion in a recent election case, when the conclusion of personal culpability was powerfully pressed on me, to give many hours of painful consideration to the duty of a judge in such cases. I have come to the conclusion that I best discharge the duty cast upon me by declining, on such evidence as is now before me, to find the respondent personally liable.

I find that the respondent was not duly elected, and that his election was void. I order that the respondent do pay the petitioners' costs, save and except such costs as may be on taxation shown to have been properly incurred by the respondent in consequence of the allegations as to a scrutiny of votes or the polling of illegal votes, and the prayer for the seat as claimed by and stated in the petition—which allegations and claims were abandoned by petitioners at the opening of the trial, and which costs are

to be paid to the respondent as an offset against petitioners' costs. I also find that James M. Fraser, Edward Gainor, Andrew Forester, James Smith, Michael Kerby, Aaron Baker, James Kerby, Jeremiah Hallett, David B. Kelly and Bernard Campbell, have been found, in my judgment, to be guilty of corrupt practices, and I shall report them accordingly.

(9 *Commons Journal*, 1875, p. 14)

NORTH VICTORIA.

BEFORE THE ELECTION COURT.*

TORONTO, *26th June and 10th July, 1874.*

HECTOR CAMERON, *Petitioner*, v. JAMES MACLENNAN, *Respondent.*

Dominion Elections Act, 1874, not retrospective—Candidate a petitioner—Preliminary objections on bribery, treating, undue influence and travelling expenses—Corrupt practices—Assessment roll—Qualification of voters—Scrutiny—Mistakes in voters' lists—Report of Judge to Speaker.

The Dominion Elections Act of 1874 does not affect the rights of parties in pending proceedings, which must be decided according to the law as it existed before the passing of that Act; sec. 20 of that Act referring to candidates at some future election.

A candidate may be a petitioner although his property qualification be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated, but he may still show that the respondent was not duly elected, if he so charge in his petition.

The definition of "corrupt practices" in sec. 3, and the effect of sec. 20 of Controverted Elections Act of 1873, as to the report of Election Judges to the Speaker, considered.

The first principle of Parliamentary law is that elections must be free; and therefore, without referring to statutory provisions, if treating was carried on to such an extent as to amount to bribery, and undue influence was of a character to affect the election, the election would be void. A single bribed vote brought home to a candidate would throw doubt on his whole majority, and would therefore annul his return.

On a preliminary objection to a petition claiming the seat on a scrutiny, the Court declined to strike out a clause in the petition which claimed that the votes of persons guilty of bribery, treating and undue influence, should be struck off the poll. The giver of a bribe, as well as the receiver, may be indicted for bribery.

* The Judges present were: Richards, C. J.; Spragge, C.; and Hagarty, C. J. C. P.

The Court declined, in the present state of the law, to exclude inquiry as to the payment of travelling expenses of persons going to and returning from the poll, inasmuch as such payment might amount to bribery.

By the Dominion Elections Act of 1873, the qualification of voters to the House of Commons was regulated by the Ontario Election Acts.

The assessment roll is conclusive as to the amount of the assessment; but the mere fact of the name of a person being on the roll is not conclusive as to his right to vote. The Returning Officer is bound to record the vote if the person takes the oath, but that is not conclusive.

A petitioner claiming the seat on a scrutiny may show, as to votes polled for his opponent: (1) That the voter was not 21 years of age; (2) that he was not a subject of Her Majesty by birth or naturalization; (3) that he was otherwise by law prevented from voting; and (4) that he was not actually and *bona fide* the owner, tenant, or occupant of the real property in respect of which he is assessed.

Mistakes in copying the voters' lists should not deprive legally qualified voters of their votes any more than the names of unqualified voters being on the list would give them a right to vote. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or were not properly certified, or the omitting to do some act as to which the statute is directory, is no ground for setting aside an election, unless some injustice resulted from the omission, or unless the result of the election was affected by the mistake.

This petition was presented by the defeated candidate against the respondent, and contained the usual charges of corrupt practices, and claimed the seat on a scrutiny of votes. The vote at the election was: for respondent, 564, and for petitioner, 560.

The respondent filed preliminary objections to the status of the petitioner, alleging that he had not the proper qualification required by law to entitle him to be elected a member of the House of Commons, and also to the following paragraphs of the petition:

"3. That the said respondent was, by himself and other persons on his behalf, guilty of bribery, treating and undue influence before, during and after the said election, whereby he was and is incapacitated from serving in Parliament for the said electoral district, and the said election and return of the said James Maclennan were and are wholly null and void.

"4. That many persons voted at the said election, and were reckoned upon the poll for the said James Maclennan, who were guilty of bribery, treating or undue influence,

and who were bribed, treated or unduly influenced to vote thereat for the said James Maclennan, and that the votes of all such persons were null and void, and ought now to be struck off the poll.

"5. That many persons were admitted to vote and did vote at the said election for the said James Maclennan, who were not entitled to vote thereat or to have their names retained or inserted on the voters' lists for the said electoral division, by reason of their not being qualified in respect of property, occupation or value, or whose qualification was for other causes insufficent, or who were respectively subject to legal incapacity or were prohibited by law from voting, or were not subjects of Her Majesty by birth or naturalization, and such votes ought now to be struck off the poll.

"8. That many persons who had hired their horses, sleighs and carriages to the said James Maclennan and to his agents, for the purpose of carrying electors to and from the polling places at the said election, voted for the said James Maclennan at the said election, and were reckoned on the poll for him; and that the travelling and other expenses of many persons in going to and returning from the said election, and who voted for the said James Maclennan, were paid by the said James Maclennan or by his agents, and that the votes of all such persons were and are void, and should be struck off the said poll.

"10. That the voters' lists used by the several deputy returning officers at the said election were not correct alphabetical lists of all persons entitled to vote at the said election, within the several municipalities, or subdivisions, or wards thereof, together with the number of the lot, or part of a lot, or other description of the real property in respect of which each of them was so qualified; nor were such voters' lists duly certified according to the statute in that behalf, but the names of divers persons not properly entitled to vote at the said election, and who voted for the said James Maclennan, were improperly inserted in such voters' lists, and ought to be

struck off the poll, and the names of divers persons who were properly entitled to vote thereat, and who tendered their votes for your petitioner, were omitted from the said voters' list, and ought to be added to the poll.

"12. That the polling subdivisions or wards in the said electoral district were not the same as those used at the last preceding election of members of the Legislative Assembly, and that the polling places for each of the subdivisions, or wards, were not provided in the most central and convenient place for the electors of such subdivisions, or wards, nor was public and sufficient notice given, by proclamation or otherwise, of the said polling subdivisions, and of the places appointed for holding the said poll, and that the polling subdivisions at the said election were not established according to law."

The preliminary objection to the third paragraph was that even if the respondent was, by himself or other persons on his behalf, guilty of treating and undue influence, as alleged, such acts would not incapacitate him from serving in Parliament for the said electoral district, nor render the said election and return of the respondent null and void.

And as to the fourth, fifth, and latter part of the eighth paragraphs of the said petition, that even if the facts were as stated, such facts are not sufficient to render the said votes null and void, or to entitle the petitioner to have the same struck off the poll, or in any event would not prevent such persons voting at the said election, or entitle the petitioner to have the said votes declared null and void.

And as to the tenth and twelfth paragraphs of the said petition, on the ground that even if the facts were as stated, such facts are not sufficient to render the election or return of the respondent null and void, or to entitle the petitioner to be declared duly elected and returned.

A summons having been taken out by the petitioner to set aside the prelimiminary objections, cause was shown by

Mr. Mowat, Q.C. (Attorney-General of Ontario), *and Mr. Bethune*, for respondent.

Mr. F. Osler, for petitioner, supported the summons.

RICHARDS, C. J.—Section 41 of the British North America Act, 1867, enacts that, until the Parliament of Canada otherwise provides, all laws in force in the several Provinces of the Union, relative (amongst other matters) to the following: The qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly, or Legislative Assembly, in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the returning officers and their duties, the proceedings at elections, etc., shall respectively apply to elections of members to serve in the House of Commons for the same several provinces. Then, by a proviso, special provision is made that in Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged 21 years or upwards, being a householder, shall have a vote.

Under the Imperial Statute 3 & 4 Vic., cap. 35, sec 28, it was provided that "No person shall be capable of being elected a member of the Legislative Assembly of the Province of Canada who shall not be legally or equitably seized as of freehold for his own use and benefit of lands or tenements held in free and common soccage, or seized or possessed for his own use and benefit of lands or tenements held in fief or in roture, within the said Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, charges, mortgages, and incumbrances charged upon and due and payable out of or affecting the same; and every *candidate*, at such election, before he shall be capable of being elected, shall, if required by any other candidate, or by any elector, or by the returning officer, make the following declaration:

"I, A. B., do declare and testify that I am duly seized

at law or in equity as of freehold, for my own use and benefit, of lands or tenements held in free and common soccage (or duly seized or possessed for my own use and benefit of lands or tenements held in fief or in roture as the case may be), in the Province of Canada, of the value of five hundred pounds of sterling money of Great Britain, over and above all rents, mortgages, charges and incumbrances charged upon or due and payable out of or affecting the same, and that I have not collusively or colorably obtained a title to or become possessed of the said lands and tenements, or any part thereof, for the purpose of qualifying or enabling me to be returned a member of the Legislative Assembly of the Province of Canada."

Sec. 36, Con. Stat. of Canada, cap. 6, recites that under the 28th section of the Union Act every candidate shall, if required, make the declaration, and then proceeds to enact that every such candidate, when *personally* required as aforesaid to make the declaration, shall, before he shall be elected, give and insert at the foot of the declaration required of him a correct description of the lands or tenements on which he claims to be qualified according to law to be elected, and their local situation, by adding immediately after the word "Canada," which is the last word in the said declaration, the words, "And I further declare the lands or tenements aforesaid consist of," &c.

Under both the Union Act and the Consolidated Statute, wilfully false statements in relation to the qualification make the party guilty of a misdemeanor, and liable to the pains and punishment incurred by persons guilty of wilful and corrupt perjury.

Sec. 37 of Con. Stat. cap. 6, enables a candidate to make the declaration voluntarily before as well as after the date of the writ of election.

Sub-sec. 2. "No such declaration, when any candidate is required to make the same by any other candidate, or by any elector, or by the returning officer, above provided, need be so made by such candidate unless the same has been personally required of him on or before the day of

nomination of candidates at such election, *and before a poll has been granted*, and unless he has not already made the same voluntarily as he is hereinabove allowed to do, *and not in any other case*; and when any such declaration has been so required according to law, the candidate called upon to make the same may do so at any time during such election; provided it be made before the proclamation to be made by the returning officer at the close of the election of the person or persons elected at such election."

Sub-sec. 3 allows the declaration to be made before the returning officer, or a J.P., who shall attest the same by writing at the foot the words "taken and acknowledged before me," etc., or words to the like effect, and by dating and signing the attestation.

Sub-sec. 4. When a candidate delivers or causes to be delivered such declaration, so made and attested, to the returning officer at any time before the proclamation made by him at the close of the election, he shall be deemed to have complied with the law to all intents and purposes.

The intention of the Imperial Legislature seems to have been to make the same qualification as to property necessary to qualify a candidate for the House of Commons, here in Ontario (Upper Canada), as was necessary to qualify him to be elected a member of the House of Assembly of the then Province of Canada. Of course the latter part of the declaration, where it alleged that the qualification was not colorably obtained to qualify him to be returned a member of the "Legislative Assembly of the Province of Canada," could not apply in the same words; the intention being that he should declare that he had not obtained the qualification colorably to qualify him to be elected "a member of the House of Commons of the Dominion of Canada." The intention seems plain and undoubted. There is also another difficulty in literally complying with the terms of the Con. Stat., cap. 6, as to the declaration being delivered to the returning officer

at any time *before the proclamation* made by him at the closing of the election, no such proclamation being required under the election law as it then stood. By 29 & 30 Vic., cap. 13, sec. 10, no day was to be fixed for closing the election, nor any proclamation of the candidate elected. Nevertheless, if the candidate made the declaration and delivered it to the returning officer before the polling was closed, and probably before the returning officer had made his return to the Clerk of the Crown in Chancery, of the total number of votes taken for each candidate, it would have been in time. Though the terms of the Consolidated Act could not be literally complied with, it could in substance. We are not, therefore, prepared to say that by the alteration in the law referred to there has been such a change effected that no property qualification was required by a candidate to be elected for the House of Commons at the time the election was held.

If the candidate who now seeks the seat was not qualified under the statute to be elected, I take it for granted that the respondent will show that under the 54th section of the Controverted Elections Act of 1873. It does not follow from this, however, that he may not be a good petitioner. Before the Grenville Act, 10 Geo. III., cap. 16, there was a difficulty as to the person who could be a petitioner, and his qualification as an elector was often attacked; but that statute provided that any person claiming to vote, or who claimed to be returned, might present a petition complaining of an undue election. Under the Imperial Statute, 31 & 32 Vic., cap. 125 (from which our Acts are copied), it is provided by sec. 5 that a petition complaining of an undue return, or undue election of a member to serve in Parliament, may be presented to the Court by any one or more of the following persons:

1. Some person who voted, or who had a right to vote at the election to which the petition relates; or

2. Some person claiming to have a right to be returned or elected at such election; or

3. Some person alleging himself to have been a candidate at such election.

Under the Dominion Act of 1873, cap. 28, sec. 10, a petition complaining of an undue return, or undue election of a member, or of no return, or a double return, may be presented to the Election Court:

1. By *some person* who was *duly qualified* to vote at the election to which the petition relates; or

2 and 3. Are in the very words of the Imperial Act.

Now, here the petitioner was a candidate, and claims to have a right to be elected and returned at the said election.

We have been referred to the *Honiton case* (3 Lud. 163, 165 [1782],) where it was decided that M.'s election having been declared void by a committee, on the ground of bribery, and he stood on the vacancy, and being unsuccessful, petitioned against the return of his opponent, it was objected that as he could not legally be a candidate, he could not petition. The committee resolved that the said M. was not eligible to fill the vacancy occasioned by the said resolution. He was, therefore, not permitted to proceed. It is not very clear if a new election was prayed for, or that the return of the sitting member might be declared void. There were electors who were petitioners, and their petition was tried as to the charges of bribery, which were decided in favor of the sitting member.

In the *Taunton case*, 1831 (referred to in Wolferstan's Law of Elections at p. 8, and Perry and Knapp's Election Cases, 169, note), the objection that petitioner could not proceed, because the sitting member was prepared to prove bribery against him, was overruled.

In the *Penryn case* (P. & K. 169, n.), the petitioner had refused to take the qualification oath when called upon. The committee held that, not having complied with the necessary provisions to give him the character of a candidate, he had no title to petition: *Sandwich case* (*ibid.* 169); *Great Grimsby case* (*ibid.* 169); Roe on Elections, 2nd Ed. 123; Rogers on Elections, 10th Ed. 410.

But a person alleging himself to be a candidate is entitled *prima facie* to petition, unless his disqualification is obvious and incontestable: *Londonderry case* (W. & Br. 214).

It is no objection to the petition of electors being proceeded with, that their candidate is disqualified: *Colchester case* (3 Lud. 166), unless, *semble*, the petition *only* claims the seat for the candidate on the ground that he had the majority of legal votes.

In Wolferstan's book at p. 5, referring to the petitioner under the English Act, as to a person who voted, or had a right to vote at the election to which the petition relates, the author says, that this means those who rightfully voted, or whose qualification on the register, whether they voted or not, was unimpeachable *at the time of the election: Lisburn case* (W. & Br. 222), decided under secs. 11 & 12 Vic., cap. 98. The words of 31 & 32 Vic., cap. 125, are identical: *Cheltenham case* (W. & Br. 63).

Under the statutes previous to 11 & 12 Vic., cap. 98, any one claiming in his petition to have had a right to vote at the election might petition. But under that state of the law, committees allowed the sitting members to show that the petitioners had not the right they claimed: *North Cheshire case* (1 P. R. & D. 214); *Berwick case*, 30th June, 1820; *contra, Harwich case* (1 P. R. & D. 73); and *Aylesbury case* (*ibid.* 81); Rogers on Elections, 10th Ed. 408.

In the second edition of the Law of Elections, by Leigh & LeMarchant, at p. 108, it is stated, "Although the words of the Act say one or more, it is prudent, provided the petition be presented by electors, to include some larger number as petitioners, in case an objection should be taken that though they had voted, they had no right to vote at the election. Care should also be taken that all the petitioners should, as far as possible, be voters whose votes could not be impeached. If the petition is presented by a candidate, it means by any person elected to serve in Parliament at an election, and any person who has been

nominated as, or declared himself a candidate at an election."

These proceedings on election petitions are not now considered as matters in which the parties to them are alone interested. To use the language of Bovill, C. J., in *Waygood* v. *James, Taunton case* (L. R. 4 C. P. 365): "The inquiry is one not as between party and party, but one affecting the rights of the electors, the persons who are or may be members or candidates, and the House of Commons itself." And in the *Brecon case* (2 O'M. & H. 34), Mr. Justice Byles said: "The petitioner being a trustee for the whole body of the voters for the borough, and for the public generally, cannot withdraw unless he complies with the provision of the statute." Under the statute, the petition is not simply served on the sitting member, but a copy of the petition is sent to the returning officer, and he is required to publish the same, so that when a petition is presented it is known who the petitioner is, and if he is a candidate that is known throughout the electoral district. If he represents himself as a voter duly qualified to vote at the said election, on looking at the rolls and voters' lists, it there appears if he was duly qualified to vote as he claims. On turning to the statute, any person interested in the election sees it plainly stated that a candidate or voter, duly qualified to vote at the election, may petition. Under such circumstances, all persons interested in the matter would assume that the petition would go on. The special provisions in the Act to guard against a collusive withdrawal of the petition would all induce an interested elector to suppose, when a petition was presented by a candidate, or a voter duly qualified to vote at the election, that nothing could be urged against the inquiry being proceeded with.

It is objected against the petition that the petitioner did not possess the necessary qualification to be a candidate. He was a candidate in fact. His right to be such is only now questioned; and unless there is some case binding on us which expressly holds that if the preliminary

inquiry establishes the fact that the candidate was not qualified, therefore he has no *locus standi* to show that the sitting member is not duly elected, we think we ought not to stay the inquiry as to the respondent's right to hold the seat.

The decisions of committees to which we have referred are not uniform, or we might be bound by them under section 33 of the Dominion Act. There has been no case cited on this point which has been decided since the new Act came in force in England, that holds, if the petitioner is disqualified as a candidate, that the inquiry cannot be pursued. In the 2nd edition of Leigh & Le Marchant's Law of Elections, at page 76, referring to the practice, it is stated, "The general charges would usually be gone into first by the petitioner, and at the close of his case, the respondent's counsel proceeds not only to answer the charges against the respondent, but to open counter charges against the petitioner (that must be when he is a candidate). If the petitioner is disqualified, a scrutiny of votes may still take place for the purpose of showing that the respondent has not really a majority of legal votes, even though the respondent is declared not to have been guilty of corrupt practices;" and the following language of Baron Martin is quoted: "The question in the scrutiny would be which of these gentlemen had the majority of legal votes, and assuming the petitioner to have been personally incapacitated, that would not have affected the votes of the persons who gave their votes for him, they being ignorant of it. They would be perfectly good votes; and the persons who were the supporters of the petitioner would have a right to have it determined whether or not the respondent was sent to Parliament by a legal majority:" *York, West Riding, Southern Division* (1 O'M. & H. 215).

The language of Willes, J., as follows, is also cited: "Against any member, therefore, who is elected in the first instance, any one directly interested may petition. If the petitioner does not claim the seat, there is no re-

crimination allowed; but if the petitioner does claim it, the respondent is entitled to protect himself, and, before the scrutiny, prove a recriminatory case, and show that the election of the other candidate could not stand. It is true that even if he proves it, *the petitioner may still go into the scrutiny to turn out the sitting member:*" *Waygood* v. *James, Taunton case* (L. R. 4 C. P. 368).

In the *Norwich case* (19 L. T. N. S. 620) it was urged that as the sitting member had been unseated for bribery by his agents, he had no further interest, and had no *locus-standi.* Martin, B., said: "Is not the sitting member a respondent in respect of every matter that you charge in your petition, and in respect of every claim you make in your petition, and has he not a right, as *having been a candidate,* though he may be unable to protect his own seat, to show that you are not entitled to it?"

We think the weight of reason and authority is in favor of allowing a candidate to be a petitioner under the statute, though his property qualification may be defective, if it was not demanded of him at the time of his election. If he claims the seat, his want of qualification may be urged against his being seated; but he may still show that the respondent was not duly elected if he so charges in his petition.

By section 20 of the Dominion Act of the last session of Parliament, respecting the election of members of the House of Commons, it is provided that from and after the passing of this Act, no qualification in real estate shall be required of any candidate for a seat in the House of Commons of Canada, any statute or law to the contrary notwithstanding; but such candidate shall be either a natural born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, New Brunswick, Manitoba, British Columbia, or Prince Edward Island, or of this Parliament.

By section 134, it is enacted that the Act passed by the Parliament of Canada in the 36th year of Her Majesty's reign, intituled, "*An Act to make temporary provision for the election of members to serve in the House of Commons*," is hereby repealed, except only as to elections held, rights acquired, or liabilities incurred before the coming into force of this Act; and no enactment or provision contained in any Act of the Legislature of the late Province of Canada, or of any of the Provinces now composing the Dominion of Canada, respecting the election of members of the Elective House of the Legislature of any such Province, shall apply to any election of a member or members of the House of Commons held *after the passing of this* Act, except only such enactments and provisions as may be in force in such Province at the time of such last mentioned election, relating to the qualification of electors and the formation of voters' lists, which will apply for like purposes to elections of members of the House of Commons as provided by this Act. By section 135, it was provided that the Act should come into force on the first day of July next after the passing thereof.

Where proceedings have been taken before the passing of the Act referred to, to set aside the election of a member for want of the property qualification required by law, at the time the election took place, can the 20th section of the Act above quoted be successfully invoked to aid the unqualified candidate, and destroy the rights of the petitioners?

If proceedings in the Election Court are to be analogous to suits in other courts, then the rights of the parties ought to be decided according to the law as it stood before it was repealed. No doubt there may be cases where persons may be deprived of rights and remedies which they had when the actions were commenced, by the effect of some Act of Parliament. But then it ought to appear that such was the intention of the Legislature in passing the Act, or that such result

was the natural and proper one to flow from the Act itself. The intention seems to be, by the 134th section, that the Act in force at the time the elections took place should not be repealed as to elections held, rights acquired, or liabilities incurred before the coming into force of the new Act. It also refers to certain enactments which should not apply to any election of a member of the House of Commons *held after the passing of the Act.* The obvious intention of the Legislature seems to have been that which would be considered reasonable, viz., that as to the elections held before the passing of the Act, the law then in force should prevail, whilst as to elections after the passing of the Act, the new law should be acted on, and govern the rights of the parties.

Under the Dominion Statute, 31 Vic., cap. 1 (the Interpretation Act), in relation to the construction of Acts of the Parliament of Canada, it is provided by sec. 7, sub-sec. 35, that "When any Act is repealed, wholly or in part, and other provisions substituted, all officers, persons, bodies politic or corporate, acting under the old law, shall continue to act as if appointed to act under the new law until others are appointed in their stead; and all proceedings taken under the old law shall be taken up and continued under the new law, when not inconsistent therewith; and all penalties and forfeitures may be recovered, and *all proceedings had in relation to matters which have happened before the repeal, in the same manner as if the law were still* in force, pursuing the new provisions so far as they can be adapted to the old law."

Sub-sec. 36. "The repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued or established, or any proceedings commenced in a civil cause before the time when such repeal shall take effect, but the proceedings in such case shall be conformable, when necessary, to the repealing Act."

Sub-sec. 37. "No offence committed, and no penalty or forfeiture incurred, and no proceedings pending under

any Act at any time repealed, shall be affected by the repeal, except that the proceedings shall be conformable, when necessary, to the repealing Act; and that when any penalty, forfeiture or punishment shall have been mitigated by any of the provisions of the repealing Act, such provisions shall be extended and applied to any judgment to be pronounced after such repeal."

The section as to the property qualification does not come into force by repeal of the Act of 1873, under which this election was held, but by its own affirmative power, declaring *that after the passing* of the Act no qualification should be required of a *candidate* for a seat in the House of Commons of Canada. The petitioner here became a candidate before the Act in question was passed, and the election which he is contesting was held, and the respondent was returned as a member, before the Act in question was introduced. The fair and reasonable interpretation of the meaning of the Legislature is, that the 20th section refers to candidates for a seat at some future election, not to candidates when the election had taken place, and when what is to be done in relation to them is to correct the errors and mistakes then made.

The proper view to take, we think, looking at the statute itself, the Interpretation Act, and the general rules applicable to the construction of statutes, is that the Legislature did not intend to affect the rights of parties in pending proceedings, but that they should be decided as the law existed before the passage of the Act referred to.

We have already stated what we think the law was on the subject of the property qualification necessary to be possessed by candidates to qualify them to be elected, when the election in question took place.

As to the objection to the charge of treating and undue influence alleged in the third paragraph of the petition in connection with bribery, if the treating were to such an extent as to amount to bribery, and the undue influence was of a character to affect the whole election without

referring to any statutory provisions, it would, by the law of Parliament, I apprehend, influence the result.

The first principle of Parliamentary law, as applicable to elections, is that they must be *free*, and if treating and undue influence were carried to an extent to render the election *not free*, then the election would be void. The following observations apply generally to votes that may be influenced by treating, etc. A vote influenced by treating was bad before the statute, and is bad now. Under the statute it would seem necessary to show not only that the entertainment was corruptly received by the voter, but that it was corruptly given by the candidate; but as proof of the former would invalidate the vote at common law, it is unnecessary to add proof of the latter.

The 23rd section of the Corrupt Practices Act of 1854 (Imp.), which declares the giving of entertainments to voters on the polling and nomination days to be illegal, says nothing as to the effect upon the votes given. For this, therefore, resort must be again had to the common law of Parliament; and the question will be, as heretofore, whether the vote was influenced by the result of the entertainment or not.

A vote unduly influenced is a bad vote by the common law of Parliament: Rogers on Elections, 10th Ed., p. 536.

It is very embarrassing to carry out the Dominion Controverted Election Act of 1873, owing to the fact that we have no Corrupt Practices Prevention Act applicable to Dominion elections, which contains all of the provisions of the Imperial Act of 17 & 18 Vic., cap. 102, and that the Dominion Act of 1873 omits the 43rd and 44th sections, which are contained in the Parliamentary Elections Act of 1868, Imp. Stat. 31 & 32 Vic., cap. 125, from which the Dominion Act was undoubtedly framed. These sections, with some in the Corrupt Practices Act, have a very important bearing on the questions which may come before the Election Judges.

Under the 43rd section (Imp.), when it is found by the report of the Judge upon an election petition under the Act

that bribery has been committed by, or with the knowledge and consent of, any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to, and of sitting in, the House of Commons during the seven years next after the date of his being found guilty, and he shall be further incapable, during the said seven years, of holding office, etc.

The 44th section (Imp.) makes his election void if he employs any person as his agent who has been found guilty of any corrupt practice, or reported guilty of any corrupt practice by a committee of the House of Commons, or the report of a Judge on an election petition under the Act, or a report of commissioners appointed under cap. 57, 15 & 16 Vic.

Under the 45th section (Imp.), any person other than a candidate found guilty of bribery in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, during the next seven years after the time he has so been found guilty, be incapable of being elected or sitting in Parliament.

By the 36th section of the Corrupt Practices Prevention Act of 1854, Imperial Statute, it is enacted: If any candidate, at any election for any county, city or borough, shall be declared by any Election Committee guilty, by himself or agents, of bribery, treating or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city, or borough, during the Parliament then in existence.

The law being in this state in England, the Parliamentary Elections Act, section 3, declares that corrupt practices shall mean bribery, treating and undue influence, or any of such offences as defined by Act of Parliament, or recognized by the common law of Parliament. By the same section of the Dominion Controverted Elections Act of 1873, it is declared that "corrupt practices shall mean bribery and undue influence, treating, per-

sonation and other illegal and prohibited acts, in reference to elections, or any of such offences, as defined by Act of the Parliament of Canada."

Under section 20 of the Dominion Act of 1873, cap. 28, where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the Judge shall, in addition to the certificate (required by the 19th sec.), and at the same time report in writing to the Speaker as follows:

(*a*) Whether any corrupt practice has or has not been proved to have been committed by, or with the knowledge and consent of, any candidate at such elections, stating the name of such candidate and the nature of such corrupt practice.

(*b*) The names of any persons who have been proved at the trial to have been guilty of any corrupt practice.

(*c*) Whether corrupt practices have, or whether there is reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates.

These provisions are similar to those contained in the Imperial Act.

Taking the whole of that Act, it is very apparent that the report as to corrupt practices is consistent with it, and by it certain results are to follow the report. The want of these omitted clauses, and of the 36th section of the Corrupt Practices Act, renders it difficult to say how far the report, as to sections (*b*) and (*c*), required of the Judge, will be of use when returned to the House of Commons. The Legislature still requires the report to be made, and we do not see how we can strike out the clause of the petition complaining of the practices referred to.

The 18th sec. of Dominion Elections Act, 36 Vic., cap. 27, forbids any candidate, directly or indirectly, to employ any means of corruption by giving any sum of money, office, place, or employment, gratuity or reward, or any bond, bill or note, or conveyance of land, or any promise of the same, nor shall he, either by himself or his authorized agent for that purpose, threaten any elector with losing

any office, salary, income or advantage, with intent to corrupt or bribe any elector to vote for such candidate, or to keep back any elector from voting for any other candidate; nor shall he open and support, or cause to be opened and supported at his costs and charges, any house of public entertainment for the accommodation of the electors; and if any representative returned to the House of Commons is proved guilty, before the proper tribunal, of using any of the above means to procure his election, his election shall be thereby declared void, and he shall be incapable of being a candidate, or being elected or returned during that Parliament.

The Corrupt Practices Act of 1860, passed by the Province of Canada, defines bribery in the same way as the English Act of 1854, and in the same way declares the offence a misdemeanor, for which the parties may be punished, both the giver and receiver of the bribe. Under the 6th section of the English Act, it is provided that if a person claims to be placed on the list of voters who has been convicted of bribery or undue influence at an election, or a judgment recovered against him for any penal sum recoverable in respect of any of the offences of bribery, treating or undue influence, then the Revising Barrister shall erase the name of such person from the list of voters; or if he claims to have his name inserted on the list, he shall disallow such claim; and the names of such persons so expunged from the list of voters, or refused to be placed thereon, shall be inserted in a list of persons disqualified for bribery, treating or undue influence, which shall be appended to and published with the list of voters.

The 36th section, already referred to, applies to the candidate, and declares him incapable of being elected or sitting in Parliament, when he shall be declared guilty by an Election Committee.

The 3rd section of the Provincial Statute of 1860 makes the hiring of vehicles to convey electors to the polls, or paying the expenses of electors in coming to the polls

illegal acts, and makes the person offending liable to a penalty of $30 for each offence, and costs of suit; and any elector who shall hire his horse to any candidate, or the agent of such candidate, for the purpose of conveying electors to or from the polls, shall, *ipso facto*, be disqualified from voting at such election, and shall also forfeit $30 to any person who shall sue for the same.

This section, and the 18th section of the Dominion Act, cap. 27, of 1873, seem to be the only ones which declare the effect on the voter and the candidate of the illegal and prohibited acts.

In the Act of 1860, the bribery is delared to be a misdemeanor, and the mode of recovering the penalty pointed out, but its effect on the status of the member and the voter is not declared.

Whilst the Controverted Elections Act of 1873 defines what corrupt practices shall mean, and makes it necessary for the Judge, under certain circumstances, to report whether such practices have been proved to have been committed, and by whom committed, yet the statute does not declare the effect of such report. We are then left in these unprovided cases to the common law of Parliament.

The bribing of an elector was always punishable at common law, independent of the statute: Rogers on Elections, 10th Ed. 308, and Lord Mansfield's opinion expressed in *Rex* v. *Pitt* (3 Burr. 1335.)

In *Rex* v. *Vaughan* (4 Burr. 2501), Lord Mansfield said, "Wherever it is a crime to *take* it is a crime to give; they are reciprocal. And in many cases, especially in bribery at elections to Parliament, the *attempt* is a crime; it is complete on his side who *offers* it."

It therefore appears to be a crime in the giver as well as the receiver of the bribe, and both may be indicted.

In Bushby's Election Law, 4th Ed. 111, it is stated: "Now one consequence in Parliament of common law bribery, when committed by a duly qualified and successful candidate at an election, was to enable the House, and it exclusively, to annul his return, and that though only

a single bribe was proved. All the votes so procured were void, and even after deducting them, had he still a majority in his favor, the result was the same." See May's Parl. Prac. 7th Ed. 56; Simeon, 166; 2 Doug. 404, n.

This was intended not so much as a penalty, as to secure to constituents a free and incorrupt choice, seeing that a single purchased vote, brought home to the candidate, might well throw doubt on his whole majority.

It is said an elector who has administered bribes is not disqualified at common law from voting afterwards at that or any other election: Bushby 114, and cases there cited.

The unauthorized bribes of third persons, who are not agents of the candidate, do not affect his return, though given in his interest, unless the majority depends on votes so obtained, or unless such bribes occasion general corruption: Bushby, 121.

It seems a strange state of the law that the person who bribes may be indicted for a crime and punished in that way, yet his vote may stand good, whilst the person bribed loses his vote and the candidate may lose his seat. It may be that this will be the result, because of the omissions in our statute law; but when the evidence in such a case is brought before me, and I am compelled to decide, I would give the question more consideration than I have been able as yet to bestow on it, before holding that the vote of the person giving the bribe would be held good.

In being called on as we now are, without any evidence before us, to decide certain questions which may affect the qualification of voters or the standing of candidates, and which in truth can only apply to a limited number of cases (the law, both in the Dominion and Province of Ontario, differing now from the Imperial statute), the language of Willes, J., in *Stevens* v. *Tillett* (L. R. 6 C. P. 147), seems to me peculiarly applicable. He says: "The order in this case to strike out the clauses in the petition which were objected to must therefore be sustained, if it be sustained, upon showing that leaving those clauses

in the petition could not have any effectual end in the disposal of the prayer thereof, whatever might be the character of the evidence which was produced before the Judge at the trial. The true question, as it appears to me, upon this occasion, is whether in any reasonably conceivable state of the evidence a case might be made out, upon the trial of this petition before the Judge in the regular and ordinary way, which would make it the duty of the Judge to grant the prayer of the petition."

We do not feel warranted, in this stage of the proceedings, in striking out that portion of the fourth paragraph of the petition which relates to the votes of persons who were guilty of bribery, treating, or undue influence.

Under the Dominion Statute, 36 Vic., cap. 27, sec. 2, the laws in force in the several Provinces of Canada, Nova Scotia and New Brunswick, on 1st July, 1867, relative to the qualifications, etc., of members, the voters at elections of such members, the oaths to be taken by voters . . . . and generally the proceedings at and incident to such elections, shall, as provided by the British North America Act of 1867, continue to apply respectively to elections of members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, subject to exceptions and provisions thereafter made.

By sec. 4 subject to the provisions thereinafter made, the qualification of *voters* at elections in the Province of Ontario, for members of the House of Commons, *shall be that established* by the laws in force in that Province on 23rd January, 1869, *as the qualification of voters* at elections of *members of the Legislative Assembly;* and the voters' lists to be used at the election of members of the House of Commons shall be the same as if such elections were of members of the Legislative Assembly, on the basis of the qualification aforesaid; and the polling subdivisions or wards shall be the same as if such elections were for members of the Legislative Assembly; and the returning officer shall provide a polling-place for each subdivision

or ward in the most central or convenient place for such elections.

By sec. 5, the oath or affirmation to be required of voters in the said Province shall be that prescribed by the 54th section of cap. 6 of the Consolidated Statutes of Canada, and no other, except in Algoma and Muskoka, as thereafter provided.

Under sec. 41 of the British North America Act, all laws in force in the several Provinces at the time of the union relative to the voters at elections of members of the Legislative Assembly, the oaths to be taken by voters, the proceedings at elections, etc., respectively, apply to elections of members to serve in the House of Commons. The qualification of voters in Ontario referred to by sec. 4, above cited, is regulated by Provincial Statute, 32 Vic., cap. 21. By sec. 5 of that Act, the following persons, and no other persons, being of the full age of twenty-one years, and subjects of Her Majesty by birth or naturalization, and not being disqualified under the preceding sections (2, 3, 4), or otherwise by law prevented from voting, if duly registered or entered on the last revised and certified list of voters according to the provisions of that Act, shall be entitled to vote at the elections of members to serve in the Legislative Assembly, viz.:

(1.) Every male person *being actually and bona fide the owner*, tenant, or occupant of real property of the value hereinafter next mentioned, and being entered on the then last revised assessment roll for any city, town, village, or township, as the owner, tenant, or occupant of such real property of the actual value in cities of $400, in towns of $300, in incorporated villages of $200, and in townships of $200, shall be entitled to vote at elections of members of the Legislative Assembly.

As to the fifth paragraph, we think the petitioner may show:

1. That the voter was not twenty-one years of age.

2. That he was not a subject of Her Majesty by birth or naturalization.

3. That he was otherwise by law prevented from voting.

4. That he was not actually and *bona fide* the owner, tenant, or occupant of the real property in respect of which he is assessed.

We think the roll conclusive as to the amount of the assessment. The fact that the name of a person is on the assessment roll or list of voters is not conclusive as to his right to vote. If his name is on the list and he takes the oath required by the statute, the returning officer may be bound to record his vote, but that does not seem conclusive under the words of the Ontario Act. It is not being registered that gives the qualification; but though he has the qualification in other respects, he cannot vote unless his name is entered on the proper list. At one time, in England, though the name was on the register and the returning officer was bound to admit the vote, yet it might be attacked on a scrutiny, and even now for some causes may still be attacked.

Under the view we take of the qualification being regulated by the Ontario Act, we do not think we can properly pass over or disallow the part of the 5th paragraph of the petition objected to.

Then, as to the objection to the latter part of the 8th paragraph, paying the travelling expenses of persons coming and returning from the election. By the Corrupt Practices Act of Canada of 1860, sec. 3, paying the expenses of voters is an illegal act, and any elector who shall hire his horse to any candidate or agent for the purpose of conveying electors to and from the polling places, shall be disqualified from voting at such election. Section 71 of the Ontario Act, 32 Vic., cap. 21, is similar in effect, and a penalty of $100 is imposed, but the latter part provides that any elector who shall hire a horse, etc., *for* any candidate or *for* any agent of any candidate for the purpose of conveying any electors to and from the polling place, shall be disqualified from voting at such election, and under a penalty of $100. *Cooper* v. *Slade* (6 H. L. 746), seems to be to the effect that merely paying the

expenses of an elector, as the law stood in England, was not a violation of the statute, but promising to pay might be held to be bribery. In the present state of the law we do not think we can properly exclude inquiring into these matters.*

As to the objection to the 10th paragraph. If the names of persons, whose votes would not be legal in the view already expressed in the objection to the 5th paragraph of the petition, were inserted on the lists handed to the deputy returning officer, their votes for respondent would be bad, though the names were on the lists handed to the deputy returning officer, for the reasons already given. And if persons who were in other respects properly entitled to vote, and whose names were on the last revised and certified list of voters according to the provision of the statute, tendered their votes for petitioner, it may be contended with great force that they are entitled to have their votes now recorded for the petitioner. The mistake in copying their names on the list for the particular subdivision, or ward, should not deprive a legally qualified voter of his vote, though it might justify the deputy returning officer in refusing to receive it. But the mere fact that the lists were not correct alphabetical lists, or had not the correct number of the lot, or their not being duly certified according to the statute, would be no ground for setting aside the election, unless some injury resulted from the omission, as if some electors were deprived of their votes, or the result of the election in some way was influenced by the mistake.

As to the 12th paragraph, the observation just made will apply to it. These objections to what may really be considered as omitting the doing of matters as to which the statute is considered as directory, have never been held of sufficient importance to avoid an election, unless it can be shown that some injustice has been done by the

* Hiring teams to convey voters to or from the poll was subsequently declared to be a corrupt practice by the Dominion Elections Act, 1874 (37 Vic., c. 9), ss. 96 and 98. See also *Young* v. *Smith*, 4 Sup. Ct. Can. 494.

omission—that voters who were entitled to vote have been deprived of their rights, and that if what the statute required had really been done, a different result would have followed. In the absence of this being shown, these objections would not have any weight; and this paragraph was given up on the argument.

The result is that all the paragraphs in the petition stand except the 12th: that all the preliminary objections are overruled except the 1st and the 8th, and if it is shown at the trial that the petitioner had not the necessary property qualification, he cannot be seated, but he may still show that respondent was not duly elected.

SPRAGGE, C.—I have entertained some doubt whether the voters' lists under the Provincial Statute, 32 Vic., cap. 21, are not conclusive, so far as the property qualification of voters is concerned, though I confess I feel the force of the reasoning by which an opposite conclusion is arrived at. Section 5 of the Act defines the property qualification entitling a person to vote. Then follow other sections, making provision for the registration of voters and the making out by municipal officers of lists of persons entitled to vote. Then follows sec. 7, subsec. 10, as follows: "No person shall be admitted to vote unless his name appears on the last list of voters made, certified, and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election; and no question of qualification shall be raised at any such election, except to ascertain whether the party tendering his vote is the same party intended to be designated in the alphabetical list as aforesaid." Sec. 41 provides for an oath being administered to a voter by the deputy returning officer. This oath is in proof (*inter alia*) of property qualification in the real estate in respect of which the voter's name appears on the voters' list; also as to his being a British subject; as to his being of age; and that he has not voted before at the election, and has not received or been promised anything to induce him to vote.

An oath being required as to the property qualification of the voter, is raising a question of qualification other than the question of identity, so that even at the election itself the voters' list is not conclusive as to the right of a person whose name is upon it, to vote: and if not conclusive there, it is, *a fortiori*, that it would not be conclusive upon a scrutiny upon the trial of an election petition.

Upon subsec. 10 alone I should have felt some doubt, for the defining of the qualification in sec. 5 was necessary to the registration of voters, and preparing the lists for election; and the provision in sec. 5 might well be introduced in the Act for that purpose only; but sec. 41 and the voters' oath show that the voters' lists were not intended to be conclusive. The voter is required to swear that at the final revision and correction of the assessment roll he was actually, truly, and in good faith possessed to his own use and benefit as owner, or tenant, of the real estate in respect of which his name is on the voters' list; and I agree in thinking that the fact whether he was so possessed is a fact necessarily open to question upon a scrutiny.

HAGARTY, C.J. C.P., concurred.

NORTH VICTORIA.

BEFORE MR. JUSTICE MORRISON.

LINDSAY, *4th to 10th November, 1874.*

HECTOR CAMERON, *Petitioner*, v. JAMES MACLENNAN, *Respondent.*

Hiring of teams—Bribery—Offers to bribe—Division Court bailiffs.

Where the amounts paid for hiring teams were fair and reasonable, such hiring was not bribery under the Dominion Controverted Elections Act, 1873.

Where a canvasser for the respondent received money for hiring teams, and hired from those indebted to him, and agreed with them to give them credit for the respective amounts to be paid for the teams, such an arrangement was not evidence of corrupt practices.

Money given to a person to hire a team and to go round canvassing, held, on the evidence, not bribery.

One L., a tavern keeper, was told by H., one of respondent's canvassers, that he thought L. could get $18 or $20 from P., if he would stay at home during the election. L. expected that the money would be spent at his tavern, and showed that he did not know what was intended. Neither H. nor P. were examined:

Held, on the evidence, there was no actual offer to bribe.

Observations on the impropriety of Division Court bailiffs canvassing voters during an election.

The petition is set out on p. 384. The petitioner and respondent were the candidates at the election. After the decision of the Election Court on the preliminary objections, the petition was brought on for trial.

The Petitioner in person for petitioner.

Mr. John D. Armour, Q.C., for respondent.

The general facts of the case are set out in the judgment.

MORRISON, J.—I quite concur in the observations made by the petitioner, in closing his argument, that from the evidence throughout there is not the slightest suspicion of an imputation against the purity of the respondent's dealings in or about the election, or that the slightest suspicion exists that he did not honestly do his utmost to avoid any act and anything illegal or contrary to the

principles of the election law; while, on the other hand, he appears to have acted with the utmost care and caution, and with a true desire to avoid and prevent any improper act. I may further add that in taking into account that the riding consists of thirteen townships, in many of which the voters are sparse and reside apart, and have necessarily in many cases considerable distances to go to the polls, the expenditure of money—which principally, if not all, was spent in hiring conveyances—was, in my opinion, very moderate indeed.

I shall now proceed very briefly to state the conclusions I have arrived at on the charges of bribery and corrupt practices. As to the general point raised by the petitioner with respect to the hiring of the teams as being a corrupt practice, and so avoiding the election, I must follow the decision of the Election Court in this and other cases, which has decided, as I take it, that it is not a corrupt practice *per se* to hire vehicles, &c.; and I am of opinion that in this case the amounts paid for teams hired were only fair and reasonable, and that the hiring did not in any case amount to bribery.

In the particular charges, the first I have to consider is that of James Stewart, who was a member of the respondent's committee. It appeared he expended a sum of money —not more than $40; $30 of which he got from Capt. Sinclair, the agent of respondent. He accounted for the expenditure in the hiring of teams (a memorandum of which he kept at the time and produced), and in hiring a person to take out check-books to the polls. It is alleged that he paid $4 improperly to one Carmichael, who was also on the committee, telling him he might require it during the election; that he applied a large portion of the $30 contrary to his instructions (viz., in paying for teams); and that instead of paying money to the parties, he merely gave them credit for the amounts. Mr. Carmichael testified that while he received the $4 he did not require it, did not spend it, and that he retained it for the committee, and that he did not receive it for any

improper purpose. Mr. Stewart swore that the amounts paid for the teams were reasonable, and that he had hard work to get teams for the price, as the weather was rough, and that the amounts paid or credited for the teams had nothing to do with the way in which the owners should vote, and that there was no understanding about it. I have no reason to doubt the truth of Mr. Stewart's or Mr. Carmichael's statements, and I see no reason for thinking that they were dealing corruptly in the matter.

As to the charge against Alexander Fraser, who swears that he was neither a member of a committee nor an agent of the respondent, but that he acted as a mere supporter, it appears he received $12 from Mr. Stewart and $12 from Capt. Sinclair, which moneys it is quite clear he got for the purpose of hiring teams; and he swears he engaged five teams. It is alleged against Fraser that although he got the moneys to pay for teams, that the persons whose teams he hired were persons indebted to him. It appears that he was a blacksmith, and that he had accounts against them, and he told them respectively that he would credit them with the respective amounts, and that they said it would be all the same as money. It was suggested that he only hired four teams. Fraser, however, swears that he hired five, and it is urged that in obtaining the money, and not paying the parties money for the teams, is evidence of a corrupt act, or a corrupt arrangement between the giver of the money and Fraser; in other words, that it was not received by him for the purpose alleged. There was nothing in evidence to support this. The conduct of Fraser may be open to observation for engaging the teams of persons who were indebted to him; but I cannot see that this sharp practice on his part made the giving the money to him, or his mode of using it, bribery or a corrupt practice. Fraser did not appear to be prompted by a corrupt motive, but his mode of dealing was not straightforward.

As to the charge against Mr. Margach. He was an active canvasser for the respondent; he received $24 from the

respondent for his own personal expenses; and it appears he made an arrangement with one Hartle to go round and canvass. Hartle had no team of his own, and Margach told him to hire a team, and gave him $20 or $30 to pay for hiring and personal expenses; and as Margach has not yet got an account of this money, it was urged that this engaging of Hartle was a corrupt act. I fail to see it in that light from the evidence adduced.

Then as to Hartle's dealings with Thomas Leary. From the latter's testimony it appears that, according to his own statement, Peck and Hartle were desirous that he should stay at home during the election; that Hartle said to Leary he thought he could get $18 or $20 from Peck if he did so. Leary stated that he expected it was to spend in his bar; and that having ascertained immediately after the conversation that the petitioner would be a candidate, he determined not to stay at home, and he voted for the petitioner. Hartle was not called; Peck was, but was not examined in relation to the matter. No doubt an offer to bribe is as bad as an actual payment; and if the case made out is that of an offer to bribe, as said by Martin, B. in the *Cheltenham case* (1 O'M. & H. 66), "the evidence required should be stronger than in respect to bribery itself; it ought to be made out beyond all doubt; because when two people are talking of a thing which is not carried out, it may be they honestly give their evidence, but one person may have understood what was said by another differently from what he intended." Here we have only Leary's evidence, and he does not prove an actual offer to bribe, but merely that Hartle said he thought he might get $18 or $20 from Peck if he would stay at home. Leary did not expect to get the money even if Peck assented, but that the money would be spent at his tavern. Leary showed in his evidence that he clearly did not understand what was intended. I do not think that I should be warranted upon such testimony to hold that there was an actual offer to bribe,

and particularly without Peck and Hartle being examined on the subject.

With reference to the McGillivrays' case. It is evident that the McGillivrays were in the hands of the bailiff from time to time, and very probably they supposed McSwain had the Taylor execution when he called with Boadway and asked how the McGillivrays intended voting, and finding that McSwain and his companion were canvassing for the respondent, they thought it better not to vote, not because any undue influence in fact was used, but upon the expectation that they would receive further favors from the bailiff by adopting that course. I don't hesitate to say that it is a highly improper act for the bailiff to canvass parties against whom he had an execution; I will further add, canvassing at all. We all know that persons in the station of life of the McGillivrays, when in pecuniary difficulties, may be strongly influenced by a bailiff without anything being said, except how they are going to vote; and the Legislature would do well to prohibit canvassing by Division Court bailiffs.

On the whole, I am of opinion that the petitioner has failed to prove that any bribery or any corrupt practice was resorted to by the respondent or his agents.

A scrutiny of the votes having taken place, it was found that both candidates had an equal number of votes, and it was then agreed that the election should be declared void, which was ordered.

(9 *Commons Journal*, 1875, p. 16.)

NORTH SIMCOE.

BEFORE THE ELECTION COURT.*

TORONTO, *26th June and 16th July, 1874.*

HEZEKIAH EDWARDS, *Petitioner*, v. HERMAN HENRY COOK, *Respondent.*

Preliminary objections—Whether petitioner disqualified by bribery, &c.—Validity of entry of voter's name on assessment roll.—Champerty.—Fraud.

The Court will not go behind the voters' list to inquire whether a voter's name was entered upon the assessment roll in a formal manner or not.

A duly qualified voter is not disqualified from being a petitioner, on the ground that he has been guilty of bribery, treating or undue influence, during the election.

Disqualifications from corrupt practices on the part of a voter or candidate arise after he has been found guilty, and there is no relation back.

It is not a champertous transaction that an association of persons, with which the petitioner was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition.

A charge that the petition was not signed by petitioner *bona fide*, but that his name was used *mala fide* by other persons, is a matter of fact to be tried, and cannot be raised by preliminary objection.

The petition contained the usual charges of corrupt practices.

The respondent filed preliminary objections, submitting:

1. That the petitioner was not duly qualified to vote at the said election, whereby he was incapable of being a petitioner.

2. That the petitioner was not actually and *bona fide* the owner, tenant or occupant of the real property of the value of $400, in respect of which his name was entered on the list of voters used at the said election, and was not legally entered on the last revised assessment roll, upon which the said voters' list was founded as such owner, tenant or occupant, because, as the fact was, one Faraghar was assessed in respect of the said real property as tenant, and one Arnall as owner of the same, at the value of $200, which was the full value thereof, and the said Faraghar, at the time of the making of the said

* The Judges were the same as in the *North Victoria case* (*ante* p. 584).

assessment, was in actual possession of the said property as such tenant, and no appeal was had against the said assessment of the said Faraghar, and after the delivery of the assessment roll to the clerk of the municipality by the assessor, the said Faragher ceased to be, and the petitioner became, tenant of the said property at a monthly rent of five dollars and fifty cents, and thereupon the said petitioner appeared before the Court of Revision for the said municipality, and fraudulently procured the name of the said Faraghar to be erased from the said roll and the name of the petitioner to be substituted therefor, and fraudulently procured the value of the said property to be inserted in the said roll at $600, in order to give the petitioner an apparent qualification to vote, and no notice of the said application of the petitioner was given either to the said Arnall or Faraghar, or any other person, or by public notice of any kind, but the said Court of Revision, well knowing the object of the said petitioner in procuring the said alterations in the roll to be made, and fraudulently intending to carry out the said object, made the said alterations, without which the petitioner would not have been entitled to vote; and the respondent submits that by reason of the matters aforesaid the said alterations were and are void, and the said Court of Revision had no jurisdiction, under the circumstances aforesaid, to make the said alterations, and the petitioner was not entitled to vote at the said election, and was therefore incapable of being a petitioner.

3. That the petitioner was before, during, and after the said election, guilty of bribery, treating and undue influence, whereby his status as a voter and a petitioner was annihilated.

4. That before the filing of the petition a champertous bargain was made between the petitioner and certain other persons known as the Liberal-Conservative Association, whereby it was agreed that the costs of the said petition should be paid by the persons known as the Liberal-Con-

servative Association aforesaid, and whereby the name of the petitioner should be used.

5. That the petition was not signed by the petitioner *bona fide* with intent on the part of the petitioner to prosecute it, but that his name was being used *mala fide* by other persons, who were the real petitioners.

A summons having been obtained to strike out the preliminary objections,

Mr. Bethune, for respondent, showed cause. He referred to *Regina* v. *Court of Revision of Cornwall* (25 Q. B. 286); *Wallis* v. *Duke of Portland* (3 Ves. 494); *Carr* v. *Tannahill* (30 Q. B. 217, 31 O. B. 201); *In re National, &c., Association* (4 DeG. F. & J. 78).

Mr. McCarthy, Q.C., for petitioner, referred to *Topham* v. *Duke of Portland* (32 L. J. Chy. 606); *Lyme-Regis case* (1 P. R. & D. 28).

RICHARDS, C. J., delivered the judgment of the Court.

As to the first preliminary objection, it is a matter of fact, whether the petitioner was duly qualified or not, and that of course may be tried.

As to the second preliminary objection, we fail to see how the facts show any actual fraud in relation to placing the petitioner's name on the list of voters. The facts themselves seem to show that what was done was what really ought to have been done, and the complaint just amounts to this, that it was not done in the formal manner in which it ought to have been done. Apparently the only fraudulent thing about the matter is the word "fraudulent." At the time this petitioner had his assessment raised on the assessment roll from two to six hundred dollars, he was paying a rent which would indicate a larger value of the property than $600; and there is nothing to show, at the time it was done, that any election was likely to occur for which a fraudulent change would be made. We think we should not go behind the voters' list to imagine fraud from the facts stated in this preliminary objection.

Then as to the third preliminary objection. In the *North Victoria case*, (*ante* p. 584) reference is made to the present state of our law on the subject. Some authorities seem to show that a party bribing, who is not a candidate, is not disqualified from voting in consequence of violating the law in that respect. But if the petitioner was a duly qualified voter before and at the time of the election, and the only ground of disqualification is that he was guilty of treating, bribery and undue influence, during the election, we hardly think that would destroy his right to be a petitioner.

The subject is referred to and discussed in the *North Victoria case*, and we are not now prepared to decide against this petitioner on this preliminary objection.

We are inclined to think if the petitioner is a person who was duly qualified to vote at the election to which the petition refers, that is sufficient—that the fact that he may have done something at the election which would justify the Judge in striking out his vote, would not create such a disqualification as to destroy his status as a petitioner. It could not by relation be held to make him a person not duly qualified to vote at the election. Even in England, with the important clauses in the Corrupt Practices Act of 1854, and the Parliamentary Election Act of 1868, referring to this subject, which are omitted in our Acts, it is held that disqualifications do not arise until after the time the parties have been *found guilty* of the bribery.

In the *Launceston case* (L. R. 9 C. P. 626), the Court of Common Pleas held that Col. Deakin's disqualification to be elected or sit in the House of Commons existed for the *next* seven years after he was found guilty. His election was declared void; but the opposing candidate was not held to be elected, as would have been the case had the disqualification begun prior to the election which existed after he was found guilty.

The same penalty, under the English Act, attaches to any person other than the candidate *found* guilty of

bribery in any proceedings in which, after notice of the charge, he has had an opportunity of being heard. The incapacity exists during the seven years next after the time at which he is found guilty.

And the sixth section of the English Act as to corrupt practices, directs the revising barrister, when it is proved before him that any person who claims to be placed on the list of voters has been *convicted* of bribery, etc., at an election, or that judgment has been obtained for a penal sum recoverable in respect of bribery, etc., against any person who claims to be placed on the list of voters for any county, he shall expunge his name from the list, if it be on the list, or disallow his claim to be put on the list. These statutes contemplate the party being found guilty before the penalties attach. The decision of Mr. Justice Blackburn in the *Bewdley case* (1 O'M. & H. 176) is to the same effect as the latest case referred to in the Common Pleas.

As to the alleged champerty; if the petitioner could not enforce the alleged bargain which the persons known as the Liberal-Conservative Association made with him as to paying costs, that does not establish the fact that this petitioner has not a right to present a petition. His right arises from his being an elector, duly qualified to vote at the election, not from any interest acquired by virtue of a champertous bargain. It may be doubted whether a proceeding of this kind is one to which the ordinary rules relating to champerty can apply.

One of the latest cases I have seen on the subject is *Hilton* v. *Woods*, (L. R. 4 Eq. 432). There the plaintiff was not aware that he was the owner of certain coal mines until a Mr. Wright informed him of it. An engagement was finally made between him and Wright, that in consideration that he would guarantee the plaintiff against any costs, Wright should have a portion of the value of the property. It was contended on the argument that the bill must be dismissed on the ground that the agreement entered into between the plaintiff and Mr. Wright

amounted to champerty and maintenance, and was an illegal contract. Sir R. Malins, V. C., in giving judgment, said: "I have carefully examined all the authorities which were referred to in support of the argument (as to dismissing the bill), and they clearly establish that wherever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. . . . If Mr. Wright had been the plaintiff suing by virtue of a title derived under that contract, it would have been my duty to dismiss the bill. . . In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into the improper bargain with Mr. Wright, and I cannot therefore hold him disqualified to sustain the suit." He refused to dismiss the bill.

Here the petitioner's right is not acquired by virtue of any bargain with the Liberal-Conservative Association; and by analogy to the above case, even if the alleged bargain were champertous, which I am by no means inclined to think it was, that would be no reason for staying the proceedings on this petition. See also *Carr* v. *Tannahill et al.* (31 Q. B. 210).

We do not consider that the objection, as stated, to the petitioner's right to vote at the election, and his consequent inability to petition, arises under the 71st section of the Ontario Act, 32 Vic., cap. 21, or a similar provision, section 3, in the Corrupt Practices Act of Canada, 23 Vic., cap. 17, passed in 1860.

It is said that the fact that a third person was to pay the expenses of the petition, and had in fact paid for the last petition, was not considered to be any impediment to

the hearing: *Lyme-Regis case* (1 P. R. D. 37); Wolferstan 44, 14.

As to the last preliminary objection, that the petition was not signed by the petitioner *bona fide*, it is stated in Wolferstan on Elections, 44, that where fraud was proven against the petitioner, the petition was not heard: *Canterbury case* (Cliff. 361). Such, it is presumed, would also be the decision in the case of a petition proved to have been signed *mala fide* by some person on behalf of the real petitioners: *Sligo case* (Fal. & Fitz. 546). But the fact that a third person was to pay the expenses was not considered an objection to the hearing: *Lyme-Regis case* (1 P. R. & D. 37). At page 14 of the same work it is stated that if fraud or other improper influence has been used in obtaining the subscription of names to a petition, such a petition doubtless would not be proceeded with.

The result is, that as to the first preliminary objection, that is triable before the Election Judge as a matter of fact. The second preliminary objection is disallowed, as also the fourth, with regard to champerty. As to the fifth, it is a matter of fact whether he is the petitioner or whether any fraud has been practised on him. The mere fact that it has been agreed between him and others that he shall proceed with the petition in his name, and that they will contribute towards paying the expenses, can be no objection to the petition as we understand the law.

NORTH SIMCOE.

BEFORE MR. JUSTICE GWYNNE.

BARRIE, *10th and 11th November, 1874.*

HEZEKIAH EDWARDS, *Petitioner*, v. HERMAN HENRY COOK, *Respondent.*

Admission of bribery by agent—Candidate's expenditure at a former election—Evidence.

Before the trial the respondent served a notice upon the petitioner, admitting that the election must be avoided on the ground of bribery by an agent without his knowledge or consent. Such admission was acted upon at the trial, and the election avoided accordingly.

A candidate, when examined as a witness at an election trial, may be asked his expenditure at former Provincial and Dominion elections at which he was a candidate.

The petition contained the usual charges of corrupt practices. The proceedings before the Election Court are set out on p. 617.

Mr. D. McCarthy, Q.C., *and Mr. Boys*, for petitioner.

Mr. Bethune and Mr. W. Lount for respondent.

Before the petition came on for trial, the respondent served a notice upon the petitioner, admitting that the election must be avoided on the ground of bribery by an agent without the respondent's knowledge or consent. At the trial the respondent was examined, and admitted that he had instructed his attorney to give the notice admitting the election was void. Counsel for the petitioner agreed to accept the admission, and

Mr. JUSTICE GWYNNE thereupon declared the election void.

The respondent had been a candidate for election to the Legislature of Ontario in 1871 (see *North Simcoe case, ante* p. 50); and also a candidate for election to the House of Commons in 1872, when he was elected; and again in 1874, the election in question at this trial. During his examination as to this last election, he was asked, "What was your expenditure in 1871?"

Mr. Bethune objected to any evidence except as affecting the last election.

Mr. JUSTICE GWYNNE allowed the question.

The respondent was then examined as to his expenditures at the Provincial election of 1871, and the Dominion elections of 1872 and 1874, at each of which he had been a candidate.

(9 *Commons Journal*, 1874, p. 17.)

KINGSTON.

BEFORE CHIEF JUSTICE RICHARDS.

KINGSTON, *17th to 21st November, 1874.*

JOHN STEWART, *Petitioner*, v. SIR JOHN ALEXANDER MACDONALD, *Respondent.*

Setting aside election—Drinking custom—Meetings at taverns—Mixed motives—Excessive expenditure—Corrupt practices—Personal knowledge—Costs.

The Imperial and Dominion Election Laws, as to corrupt practices and their consequences, compared and considered.

It is a general rule that no man can be treated as a criminal, or mulct in penal actions for offences which he did not connive at; and it is settled law that enactments are not to be given a penal effect beyond the necessary import of the terms used. But the Election Laws are not to be so limitedly construed by an Election Judge; and for civil purposes they are more comprehensive, and reach a candidate whose agents bribe in his behalf, with or without his authority. Where the disqualification of a candidate is sought they are to be construed as any other penal statutes, and the candidate must be proved guilty by the same kind of evidence as applies to penal proceedings.

The avoidance of an election for an act of bribery committed by the agent of a candidate is a civil proceeding, and is not brought about to punish the candidate, but to secure an unbiassed election.

The general practice which prevails here of persons drinking in a friendly way when they meet, would require strong evidence of a profuse expenditure of money in drinking, to induce a Judge to say it was corruptly done, so as to make it bribery or treating at common law.

Meetings for promoting the respondent's election were held at public houses with the object of inducing the owners to support the respondent at the election, and because the weather was cold and meetings could not be held in the open air. No evidence was given by the petitioner that equally convenient places, and such as were more proper to be used for that purpose, could be obtained:

Held, that as the respondent and his friends had a legitimate motive for holding their meetings at such houses, although their other motives might not be legitimate, no corrupt act had been committed.

Money had been contributed by the respondent and by his friends for the purposes of the election, which had been placed in the hands of one C., a personal and political friend of respondent, who gave it without any instructions or warnings to such committee-men as applied for it. A great deal of this money was spent in corrupt purposes, in bribery, and in treating to the extent of avoiding the election. The respondent in his evidence stated that he did not, directly or indirectly, authorize or approve of or sanction the expenditure of any money for bribery, or a promise of any for such purpose, nor did he sanction or authorize the keeping of any open house, and that he was not aware that any open houses had been kept, and that he always impressed on everybody that they must not violate the law. There was no affirmative evidence to show that the money which the respondent knew had been raised for the purposes of the election was so large that as a reasonable man he must have known that some portion of it would be used for corru pt purposes.

Held, that looking at the whole case, and at this branch of it, as a penal proceeding, the respondent should not be held personally responsible for the corrupt practices of his agents.

The petitioner having been warranted in continuing the inquiry as to the personal complicity of the respondent with the illegal acts of his agents, was held entitled to the full costs of the trial.

The petition contained the usual charges of corrupt practices.

Mr. Bethune and Mr. Britton for petitioner.

Mr. R. T. Walkem for respondent.

The election took place on the 22nd and 29th January, 1874. The total vote was 1,640, of which the respondent received 831 and Mr. John Carruthers 801.

The facts and the arguments of counsel appear in the judgment of the court.

RICHARDS, C. J.—As this case is tried under the provisions of the Dominion Acts of 1873, cap. 27 and 28, it must be borne in mind that these statutes are not so broad, so far as relates to acts which will avoid an election, nor as to the consequences to the candidate of complicity in what may be considered corrupt practices, as the English Acts, the statutes of Ontario, and the Dominon Elections Act of last session.

The Imperial statute, 17-18 Vic., cap. 102, the Corrupt Practices Prevention Act of 1854, defines minutely the offences of bribery, treating and undue influence. It states that the following persons shall be deemed guilty of bribery, and shall be punished accordingly:

1. Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavor to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote, to refrain from voting, or shall corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election. 2. Procuring or agreeing to procure a place, office or employment for a voter or any other person. 3. Making any gift, loan, offer, procurement or agreement as aforesaid to or for any person to induce such person to procure or endeavor to procure the return of any person to serve in Parliament, or the vote of any voter at any election. 4. Any person who shall in consequence of any such gift, loan, offer, &c., procure or engage, promise, or endeavor to procure the return of any person to serve in Parliament, or the vote of any voter at any election. 5. Any person who shall advance, or pay, or cause to be paid, any money to or for the use of any other person, with intent that such money or any part thereof shall be expended in bribing at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election. The section then declares that any person so offending shall be guilty of a misdemeanor, and liable to forfeit £100 to any person who shall sue for the same.

Section 3 makes the voters who receive money, or make agreements to receive money, gifts, &c., for voting or refraining to vote, and for receiving money after an election for voting or refraining from voting, guilty of bribery. These persons are declared guilty of a misdemeanor, and liable to forfeit £10 to any one suing for the same. The 4th section defines corrupt treating; and the 5th undue influence.

The 36th section declares, "If any candidate at any election for any county, city or borough, shall be declared by any election committee guilty, *by himself* or his agents, of *bribery, treating or undue influence*, at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city or borough, during the Parliament then in existence."

The English Parliamentary Elections Act of 1868, defines corrupt practices to mean bribery, treating and undue influence, or any of such offences as defined by Act of Parliament or recognized by the common law of Parliament. By section 11, subsection 12, at the conclusion of the trial, the Judge shall determine whether the member whose return or election is complained of, or any and what other person was duly returned or elected, or whether the election was void. By subsection 14, when there is a charge in the petition of any corrupt practice having been committed at the election to which the petition refers, the Judge shall, in addition to such certificate, and at the same time, report in writing to the Speaker whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice. Sec. 15 provides as to the effect of the Judge's report as to corrupt practices having extensively prevailed, having the same effect as the report of a committee as to issuing a commission of inquiry.

Under the 43rd section of the Act, when it is found by the report of the Judge that bribery has been committed with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to and of sitting in the House of Commons during the seven years next, after the date of his being found guilty, and he shall further be incapable, during the said period of seven years: (1), of being registered as a voter, or voting at any election;

(2), of holding any office under certain Acts of Parliament recited; (3), of holding any judicial office, or of being appointed a justice of the peace.

The Canadian statutes under which we are now acting make the following provisions applicable to these subjects. 36 Vic., cap. 27, section 18, declares:

"No candidate shall, directly or indirectly, employ any means of corruption by giving any sum of money, office, place, &c., or any promise of the same, nor shall he, either by himself or his authorized agent for that purpose, threaten any elector with losing any office, salary, income or advantage, with intent to corrupt or bribe any elector to vote for such candidate, or to keep back any elector from voting for any other candidate. Nor shall he open and support, or cause to be opened and supported, at his costs and charges, any house of public entertainment for the accommodation of the electors. And if any representative returned to the House of Commons is proved guilty before the proper tribunal of using any of the above means to procure his election, his election shall be thereby declared void, and he shall be incapable of being a candidate, or being elected or returned during that Parliament."

The next statute in the Acts of that session, the "Controverted Elections Acts of 1873," defines corrupt practices to mean bribery and undue influence, treating, and other illegal and prohibited acts in reference to elections, or any of such offences as defined by Act of the Parliament of Canada. This definition of corrupt practices, it will be seen, differs from that contained in the Imperial Act, and it also differs slightly from that contained in the Ontario Act. The general provisions of the Dominion statute as to the trial of the controverted elections, and the report to be made by the Judges trying the same, seem to have been taken from the English Act, but the 43rd section of that Act, already quoted, for the punishment of corrupt practices, is omitted, as well as the 44th section imposing a penalty for employing a corrupt agent, and section 45 disqualifying persons other than a candidate

found guilty of bribery from being elected or sitting in Parliament, and other disqualifications as under sec. 43.

It may be as well to note here that the 46th section of the English statute refers to the disqualifying persons under the 36th section of the Act of 1854; as to a member guilty of corrupt practices other than personal bribery, within the 43rd section of that Act, the report of the Judge was to be deemed substituted for the declaration of an election committee. Now the only Dominion Act applicable to this case, which declares the punishment of bribery, is section 18 of 36 Vic., cap. 27.

By the common law of Parliament there is no doubt the respondent is so far compromised by the acts of his agents that his seat must be vacated in consequence of their admitted acts, and also by the acts committed by them as shown by the evidence given on the trial.

The further inquiry which was gone into was with a view of having the respondent declared guilty of employing, directly or indirectly, means of corruption by giving money, employment, gratuity, reward, or promise of the same, with the intent to corrupt or to bribe electors to vote for him, or to keep back electors from voting for any other candidate, or that he opened or supported, or caused to be opened or supported, at his costs and charges, houses of public entertainment for the accommodation of the electors.

Mr. Bethune, who probably has had as large experience as any counsel at the bar in this province in these election cases, admitted that he could not ask the Court to decide on the evidence that the respondent had been guilty, or had knowledge, of and consented to any distinct act of individual bribery, but he contended that there had been an expenditure of money to influence a class of votes, viz., keepers of public houses, and that this expenditure was with the knowledge and consent of the respondent. The object of holding meetings at public houses was to influence the votes of the persons who kept these houses,

and to induce them to support the respondent at the election. Mr. Noble's evidence shows that $10 a night was paid for the use of a room when $5 would have been sufficient; that there was an expenditure of $40 in treating, which would bring the case within the second branch of sec. 18 of the Dominion Act, 36 Vic., c. 27. He referred to the *Tamworth case* (1 O'M. & H. 86-7-8); *Coventry case* (*ibid.* 98); *Hastings case* (*ibid.* 218). The evidence shows that respondent desired to get the influence of this class for himself, or to prevent his opponent getting them. Then there was no account of the expenditure of the money in the several wards; respondent was bound to take care that the fund was properly applied, and it was incumbent on the respondent to call Mr. Campbell to show how the money had been expended, as he was his special agent. He also referred to the *Bewdley case* (1 O'M. & H. 18, 21).

Mr. Britton, on the same side, contended that the effect of the respondent's evidence was: That money is improperly expended at all elections; that there was some expended at his election in 1872 for bribery. He thought more money would be required for the contest in 1874 than in 1872. He furnished the money without instructions as to how it should be used. It is admitted that it was improperly used, therefore the respondent is personally responsible.

Mr. Walkem, for the respondent, contended in effect: That it was not the duty of the respondent to call Mr. Campbell. If the respondent had claimed that there was no improper expenditure of money, and that his seat ought not to be vacated, then he might be asked to show by Mr. Campbell the terms on which the money had been placed in the hands of persons who used it improperly. Now, however, the onus of proof is changed, the petitioner ought to show that the respondent has been guilty of acts which affect him personally with bribery or keeping open house. That has not been done, and the Court will not presume that acts of this sort were done, unless they are

proved by satisfactory evidence. The respondent's evidence as to what he thought was generally done at elections, given frankly and fairly, was not to be construed as admitting that he knew such things were done at this election, and that he was a consenting party to such acts. Supposing the whole amount expended on behalf of respondent $2,500 or even $3,000, that was not unreasonable. Besides the regular meetings, two or three in a night, at which the respondent addressed the people, there were ward meetings in each of the seven wards every night; besides this, canvassers had to be hired, and cabs paid for their use; all these expenses during a canvass of four weeks, it might be reasonably expected, would swallow up the sum mentioned without respondent supposing any money expended for bribery. There were about 1,600 votes polled in the city. The hiring of the rooms at the taverns was absolutely necessary, as none others could be got, and the fact that innkeepers might exert themselves for the respondent could not fairly be considered as bribery. No attempt was made to show that respondent was aware, or that the fact was, that rooms were hired of any persons who were opposed to respondent, to influence their votes; on the contrary, he (respondent) understood that the meetings were held in the houses of persons who were his supporters. Besides this, printed copies of the law were distributed amongst the committees so that they might not violate it, and respondent always impressed on everybody that they must not violate the law.

The first question is as to the nature of the evidence required to affect the personal status of the respondent so far as to disqualify him from being elected to serve in this present Parliament. The law, as it exists in England, is briefly referred to in the last edition of Bushby's Manual of the Practice of Elections, p. 114. As to the person bribing, he may be any one who does the prohibited acts, "directly or indirectly," that is, by any one who either does them himself or authorizes another to do them

for him. As this is also the case at common law, it need not be dwelt upon; the next words are "by himself or by any other person on his behalf," words which will carry two senses according to the purpose for which they are construed. When sought to be enforced penally they will mean precisely the same as does the preceding phrase.

It is a general rule that no man can be treated as a criminal, or mulcted in penal actions, for offences which he did not connive at; nor does the statute authorize any infraction of the rule. The person to be deemed guilty of bribery is spoken of throughout the sections as doing the guilty act, the addition that he does it by another on his behalf need only mean that he does it through one whom he has authorized for that purpose; and it is settled law, that enactments are not to be given a penal effect beyond the necessary import of the terms used. But in the next place the words need not be so limitedly construed by an Election Judge; and for civil purposes they are far more comprehensive, and reach every one whose agents bribe in his behalf either with or without his authority.

The first question before an Election Judge in such cases usually is as to the bribery having been effected (so too it is now enacted that any charge of a corrupt practice may be gone into before proof of agency unless the Judge otherwise direct). The second question is as to the relation existing between the person effecting it and the candidate; and if it appears that they stand in the relation of agent and principal in other respects, the candidate will not escape the result of bribery, the loss of his seat and the consequent disqualification, merely because he gave his agent no authority to bribe. This appears at first sight unjust and a hardship; no doubt it must be when a seat is vacated for bribery of which the candidate was wholly unconscious. But the avoidance of an election under such circumstances is a purely civil consequence. It is not brought about in order to punish the candidate, but to secure an unbiassed election. Were his punishment the object, of course *a guilty knowledge would have to be*

proved against him, but in that case the penalty would probably be of a graver kind, *and would not have been locally limited;* whereas in the actual state of the law he suffers no other penalty than the loss of his seat, and is eligible immediately for any place other than that at which he has been unseated.

At page 135 it is stated that formerly, if any candidate was declared by an election committee guilty, by himself or his agents, of bribery at such election he not merely lost his seat, but he became incapable of being elected or sitting in Parliament for the same place during the then Parliament. And this is still the law when he is found guilty, by the report of a Judge upon an election petition, of bribery through his agents without his own knowledge and consent. But if the Judge reports that bribery has been committed by or with the knowledge and consent of the candidate as defined above, he is to be deemed personally guilty of bribery, and in addition to his election being made void, incapable of sitting in Parliament for seven years, besides incurring other disabilities.

I come to the conclusion, inasmuch as the penalty imposed by the statute of 1873 is not merely that which pertains to the locality, but to the person of the candidate to be disqualified, and applies to all constituencies during that Parliament, that that Act is to be construed as any other penal statute, and the respondent must be proved guilty by the same kind of evidence as applies to penal proceedings.

In the *Tamworth case* (1 O'M. & H. 84) Mr. Justice Willes is reported to have said, first ascertaining upon whom rests the burden of establishing the affirmative, "You ought to judge of a case just as much by evidence which might have been produced if the affirmative were true, and which has not been produced, as by the evidence which has been laid before the Court. In other words, no amount of evidence ought to induce a judicial tribunal to act upon mere suspicion, or to imagine the existence of evidence which might have been given by the peti-

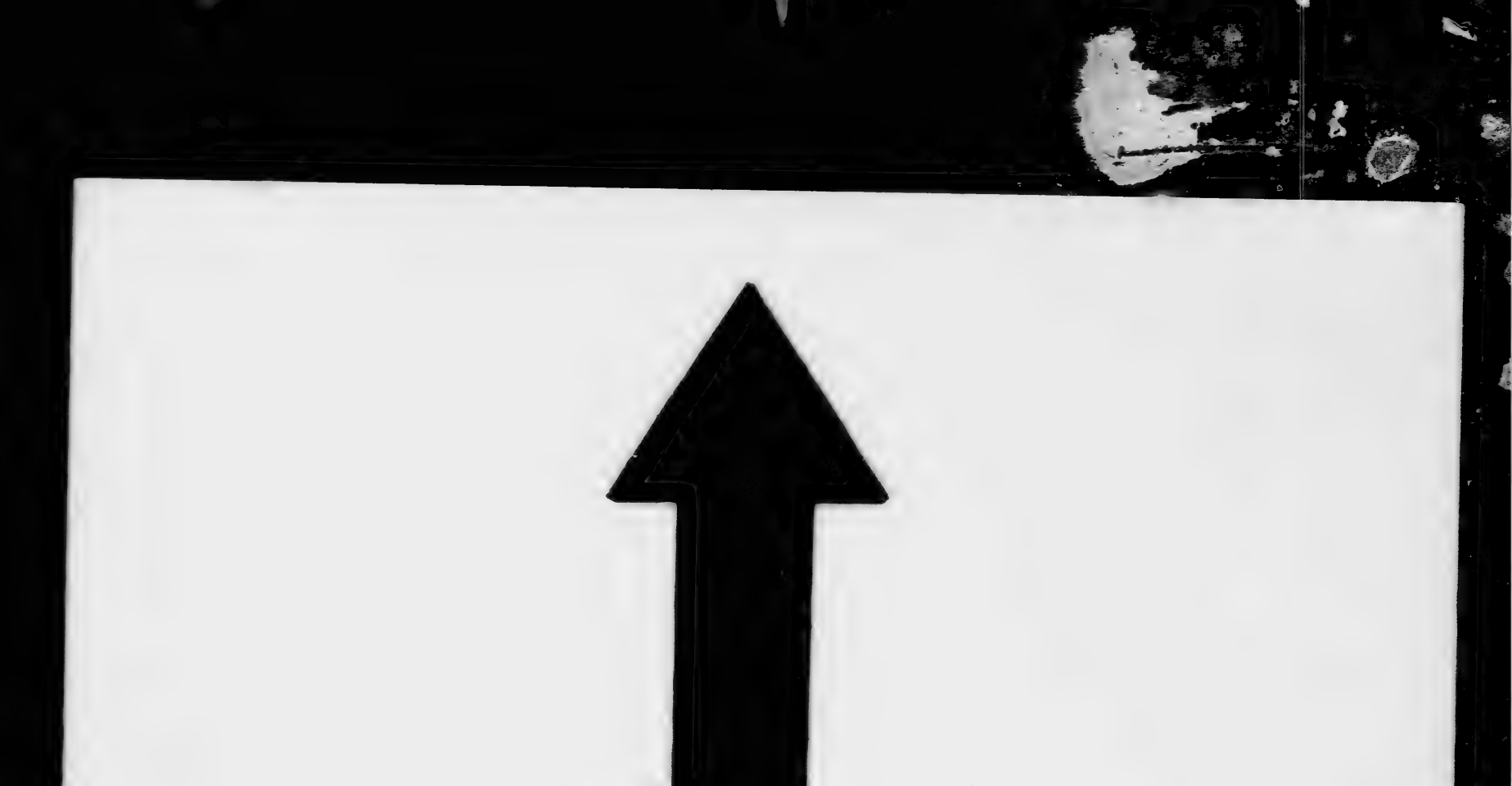
tioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence, and not upon the evidence which really has been brought forward.

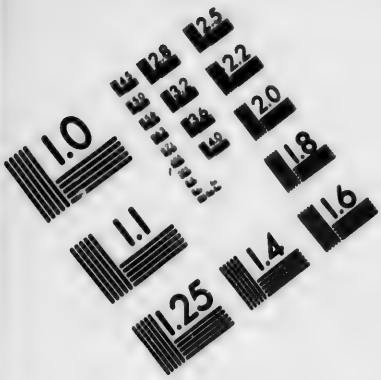
"The second principle, which is more particularly applicable to circumstantial evidence, is this: That the circumstances to establish the affirmative of a proposition, where circumstantial evidence is relied upon, must be all, such of them as are believed, circumstances consistent with the affirmative; and that there must be some one or more circumstance believed by the tribunal, if you are dealing with a criminal case, inconsistent with any rational theory of innocence, and when you are dealing with a civil case (otherwise expressed, though probably the result is for the most part the same), proving the probability of the affirmative to be so much stronger than the negative, that a rational mind would adopt the affirmative in preference to the negative."

It having been admitted that respondent has not been personally guilty of bribery, what evidence is there to show that bribery took place with his knowledge and consent?

First, as to treating; that has always been punishable at common law as a species of bribery, the only difference being that the corrupting medium was food and drink, or both. But treating in the sense of ingratiation (or, to use the ordinary language of the country, as being considered a good fellow) by mere hospitality, or even to the extent of profusion, it was doubted if it was struck at by the common law: Willes, J., *Lichfield case* (1 O'M. & H. 25). If it was shown that there was an organized and general system of treating in all directions on purpose to influence voters, that houses were thrown open where people could get drink without paying for it, such an election would be void at the common law: Bushby, p. 138.

The general practice which prevails here amongst classes of persons, many of whom are voters, of drinking in a





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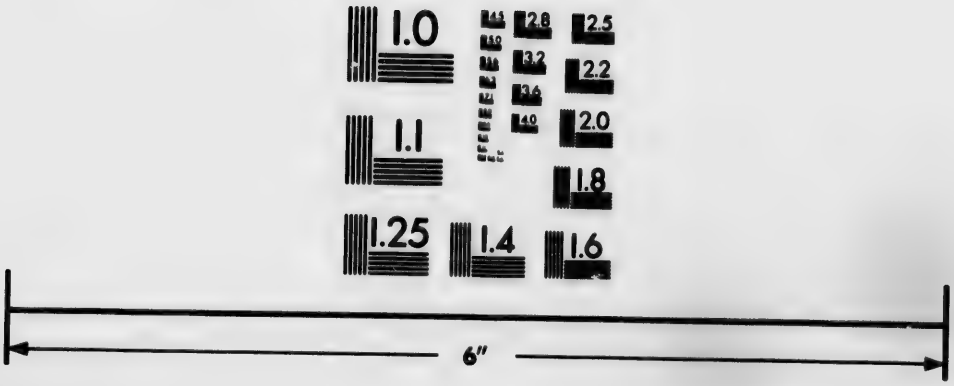

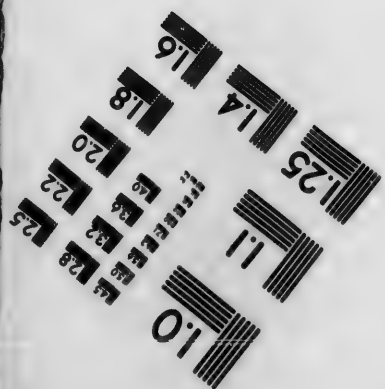

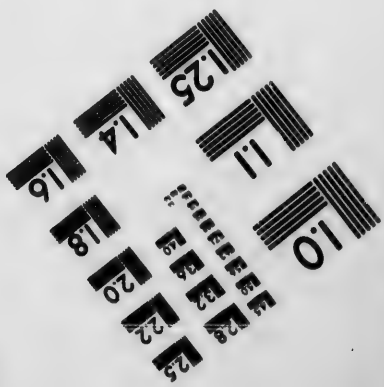

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friendly way when they meet, would require strong evidence of a very profuse expenditure of money in drinking to induce a Judge to say that it was corruptly done, so as to make it bribery or come within the meaning of "treating" as a corrupt practice at the common law.

Now, when the respondent in his evidence speaks of expending money in treating by his friends during the canvass, and when such expenditure might be within reasonable bounds, not amounting to bribery, and he said he had no apprehension they would expend any money in bribery, and the evidence does not show that he had knowledge of and consented to such extravagant expenditure in eating and drinking as would amount to bribery, I do not feel warranted in saying that such a corrupt practice existed with his knowledge and consent, particularly as he closes his evidence with the statement that he did not, directly or indirectly, authorize or approve of or sanction the expenditure of any money for bribery or a promise of any for such purpose, nor did he sanction or authorize the keeping of any open house, and he was not aware that any open houses were kept. I arrive at this conclusion now with less hesitation in consequence of the different provisions contained in the Dominion Act of 1874 and the Ontario statutes, from those contained in the statutes under which we are now acting. The corrupt practices intended to be prevented by these statutes are so clearly defined that no candidate need be involved in difficulty as to expenditures at an election unless he deliberately determines to violate the law, and the precautions taken by these statutes to compel a disclosure of money expended on behalf of a candidate will aid in deterring improper expenditures of money. While on this subject, it may be as well to point out the omission in the Dominion Statute of the provision in the English Act of 1854, by which the seat may be avoided by the corrupt acts of an agent, and the candidate prevented from standing for that constituency during the then Parliament, when it was not shown that the candidate authorized the corrupt act,

and when the additional personal disqualifications, as referred to in the Dominion Act of 1874, would not attach.

The next question is whether the holding of meetings at public houses, when the probable effect of doing so would be to make the proprietors use their influence in favor of the respondent, is not bribery or a corrupt act.

The respondent in his evidence said there were sub-committees in every ward. The houses in which they met were small; as the weather was cold, meetings could not be held in the open air, and the tavern-keepers then made it their harvest, and as only a few could attend at each meeting, they were the more numerous, and as both parties were equally active and held meetings, it was important to have the last word, and so the meetings were more numerous, and in that way the expenditure was great. In another part of his evidence he said the calling of meetings at public houses was to have people to talk to. Inn-keepers are of course a power in their localities; and that may have been a reason amongst others for holding meetings there, and another to prevent the other side from getting them. He was not aware of any meetings of his friends at any inn where the party was not a supporter of his: "Of course, when you get a supporter you want to keep him." Again, he said, "I did not consider holding meetings in the taverns and paying for the use of the rooms would be a violation of the law."

There is no doubt that respondent and his friends expected to reap an advantage by holding meetings at public houses. The very strong remarks by the Judges in the cases referred to by Mr. Bethune as to the impropriety and danger of holding meetings of candidates and their committees in inns are appropriate, and ought, and will no doubt hereafter be considered, and have their influence with candidates at future elections. In the argument it was urged that at the inclement season of the year when the election took place it was exceedingly inconvenient, if not impossible, to get rooms in which to hold meetings and committee meetings unless at inns, and

consequently that it was a necessity that this should be done, and that both parties yielded to this necessity, and held the meetings and committee meetings at inns.

It seems to me that this view was reasonable, and that the fact of the opponents of the respondent holding meetings at inns was a circumstance to show that it was necessary that this should be done at that season of the year. Not that the respondent, because his opponents did an equivocal or illegal act, was at liberty to do a similar act, but that they all thought, under the circumstances, that it was the right and proper thing to be done. As no evidence was given on the trial to show that equally convenient places, and such as were more proper to be used for that purpose, could then be obtained, I think I ought to hold that respondent and his friends had a legitimate motive for holding their meetings in these houses, although they might have had other motives which are not so legitimate.

I find this language used by Baron Bramwell (whose "brilliant common sense" is the admiration of the English Bar) in the *Windsor election case* (31 L. T. N. S. 135): "The respondent has declined to answer whether, when he made certain gifts of coals and food to a number of poor cottagers, on occasion of a flood, there being voters and non-voters amongst them, he had in view the election for the borough of Windsor." The learned Baron proceeds: "Why, it is certain that it must have been present to his mind; a man cannot suppose a thing of this sort is a matter of indifference, that it operates in no way at all; he cannot suppose that it operates unfavorably to him; therefore he must suppose that in some way or other it will to a certain extent operate favorably. But there is no harm in it if a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone, would be an illegitimate one. He is not to refrain from doing that which he might legitimately have done on account of the existence of this motive, which by itself would have been an illegitimate

motive." In the view I take of this question I do not think I can say that this was a corrupt act committed with the knowledge and consent of the respondent.

It clearly appears that the respondent himself contributed $1,000, and his friends to his knowledge a much larger sum, for the purposes of his election; and that a sum probably equal in the whole to $3,000 was raised for that purpose, the larger part of which passed into the hands of Mr. Alexander Campbell, a warm personal and political friend of the respondent; that no consultation took place between them as to how or in what way the money should be used, or what, if any, precautions were to be taken to prevent an illegal or corrupt use of this large sum of money; that Mr. Campbell, as far as we know, gave it to all or any of the committee-men that applied for it, who were employed in furthering the respondent's election, without any instructions from him as to how it was to be spent, or warnings against an improper use of it; that a great deal of this money was admittedly spent in corrupt purposes, some in direct bribery, and in treating, to the extent of avoiding the election; and some of the parties who made this improper use of the money, in giving their evidence, spoke of it in a way which might induce those who heard them to suppose that they rather took pride in having violated the law, rather than feeling that they had done acts which were culpable, disreputable as far as they were concerned, and seriously injurious to the candidate to whom they pretended to be friendly.

It cannot be denied, judging from the demeanor and manner of giving evidence of some of these witnesses, that Mr. Campbell was guilty of great carelessness, if not reckless indifference to consequences, in placing the unrestricted use of considerable sums of money in such hands as these, and in this respect he certainly failed to serve the true interests of the friend for whom he was acting, and apparently showed an indifference as to whether the law of the land was violated or not, which

certainly is not commendable, to say the least of it, in a gentleman in his position.

I shall refer to the *Bewdley case* (1 O'M. & H. 18). There it appears, from the report, that the respondent had deposited as much as £11,000 in the hands of one Pardoe, directing him in his letters to apply that money honestly, but not exercising, either personally or by any one else, any control over the manner in which that money was spent, and not in fact knowing how it was spent. The learned Judge before whom the case was tried, Mr. Justice Blackburn, said: "Upon that I can come to no other conclusion than that the respondent made Pardoe his agent for the election to almost the fullest extent to which agency can be given. A person proved to be an agent to this extent is not only himself an agent of the candidate, but also makes those agents whom he employs. The extent to which a person is an agent differs according to what he is shown to have done. An agent employed so extensively as is shown here, makes the candidate responsible not only for his own acts, but also for the acts of those whom he, the agent, did so employ, even though they are persons whom the candidate might not know or be brought in personal contact with." He then refers to the case of a sheriff answerable for the acts of his deputy as somewhat analogous.

In dealing with the evidence affecting the personal guilt of the respondent, he said: "In paying money to a person not declared to be his election agent, the respondent was in most direct terms acting contrary to 26 Vic., cap. 29, sec. 4. Besides I cannot in the slightest degree doubt that if a fund is placed in the hands of an agent by a candidate, and if it is shown that the agent expended it in corrupt practices afterwards, it is evidence tending to show that the candidate paying into those hands the money that was spent in corrupt practices was himself intending that it should be spent in corrupt practices. Then it seems to be a question to what extent it was shown, if the money was bestowed for corrupt practices,

that the candidate who gave the money was aware of it; and in that case also the extent to which it was shown that there were corrupt practices would be very material. I think if it were shown that there had been, as in many other boroughs in former times and it may be now, extensive bribery, a large number of people bribed, corrupt clubs paid money, and so forth, it would be a very serious question whether the candidate in putting money into the hands of his agents was not personally cognizant of it."

There was no affirmative evidence given to show that the money which the respondent knew had been raised for the purposes of the election was so large that as a reasonable man he must have known that it, or some considerable portion of it, would be used for corrupt practices; and that he could not suppose that the fair and reasonable amounts to be paid for rent of rooms for canvassers, and the expenses in canvassing, such as treating persons whom they met, and probably the payment of cab hire, together with expenses of committee-men for similar purposes, with the other unavoidable legitimate expenses, could absorb the sum raised for the purpose of his election.

It was suggested that rent of a room, $10, was an unreasonable sum. It was said a public meeting was held in this room, and that there were 200 people present at it; there would be light and fuel required. I cannot say it struck me that $10 was a very ext 'onate charge. The rooms that would be occupied by mittee-men would require light and fuel; there would ₁ obably be a number of people in the room; they would not likely be of that class that would necessarily take much pains to keep the place very tidy; it would probably require cleaning out next day; and if only the charge for the use of the room is to be taken into consideration, $5 a night would not seem to be a large sum, under the circumstances, for an ordinary sized room. No evidence was given as to the number of canvassers that would be reasonable, or as to their compensation or their expenses. I can recall the evidence of a witness in the *East Toronto case* (*ante* p.

70), tried before me. I think he was an honest man. He took a list of voters in a certain locality with a view of canvassing them; he wanted no pay for his time; he went at night and he met the voters frequently at taverns, and as was the custom amongst people of his class when they met to talk over matters, if they met in a tavern one would call for a drink, then the other would in his turn do so; and so, with no intent to bribe whatever, he found in this way that he was frequently out of pocket from half a dollar to a dollar, and, if I mistake not, on some nights as much as two dollars for this kind of expenditure. He had no wish to charge for his own services, but he could not afford to be out of pocket in this way. Now if a similar practice prevailed at the election here, I can understand how a candidate might well presume that the legitimate expenses attending his election in a very close and active canvass, requiring that each elector should be frequently seen to ascertain if he continued in the same mind as formerly, would be very large. In the absence then of anything like conclusive evidence on this point against the respondent, I have not been able to make up my mind that I ought to decide against him.

The fact that the respondent might have relied on Mr. Campbell, as a lawyer and a good business man, not permitting any expenditure that was improper, may perhaps be something in his favor. But the result shows, as far as we can see, that Mr. Campbell did not take any steps whatever to prevent improper expenditure, and it might, therefore, be inferred from his conduct that he thought it best not to take a different course for fear that it might have prejudiced the respondent's chance of success in the contest.

I must confess I have been very much embarrassed in coming to a conclusion in this matter satisfactory to myself. If it was not that I felt compelled to look upon this branch of the case in the nature of a penal proceeding requiring that the petitioner should prove his allegations affirmatively by satisfactory evidence, and that he

might have given further evidence to have repelled some of the suggestions in respondent's favor, if such suggestions were not reasonable ones, I should feel bound to decide against the respondent; but looking at the whole case, I do not think I ought to do so.

If it is found from experience that the provisions contained in the present laws, now in force in the Dominion and in Ontario, do not effectually put an end to corrupt practices at elections, and that in order to do so it will be necessary to bring candidates within the highly penal provisions of declaring them, when they violate the law, incapable of being elected or holding office for several years, Election Judges will probably find themselves compelled to take the same broad view of the evidence to sustain these highly penal charges that experience compelled committees of the House of Commons to take as to the evidence necessary to set aside an election.

I think the petitioner was well warranted in continuing the inquiry as to the personal complicity of the respondent with the illegal acts done by his agents, and that he is entitled to full costs, and that the respondent is not entitled to any costs for obtaining his amended particulars.

I shall, in accordance with Mr. Bethune's request, report that the respondent, by his agents, has been guilty of bribery, but that they were not his authorized agents for that purpose, and that no corrupt practices have been proven to have been committed by or with the knowledge or consent of the respondent. From my present view of the law, I do not think that such finding can affect the status of the respondent as a candidate at any future election under the statute, but I so make my report that the petitioner may have whatever benefits from it he thinks it will entitle him to. I will certify that the witnesses made full and true answers to my satisfaction.

(9 *Commons Journal*, 1875, p. 19.)

CARDWELL.

BEFORE THE ELECTION COURT.*

TORONTO, *26th June and 16th July, 1874.*

BEFORE CHIEF JUSTICE HAGARTY.

TORONTO, *19th December, 1874.*

JOHN HEWITT *et al., Petitioners,* v. JOHN HILLYARD CAMERON, *Respondent.*

Preliminary objections—Property qualification of candidate—Non-compliance with demand for.

Held, 1. As in the *North Victoria case* (*ante* p. 584), that the Dominion Elections Act of 1874 not being retrospective, the question of property qualification of candidates, at elections for members of the House of Commons held before the passing of the Dominion Election Act of 1873 can still be raised in pending cases.

2. That it is not necessary for an elector, demanding the property qualification of a candidate, to tender the necessary declaration for the candidate to make; the intention of the statute being that the candidate must prepare his own declaration.

The petition charged that the respondent had not the proper qualification entitling him to be elected a member of the House of Commons; that a demand of the qualification of the respondent was duly made on the day of nomination, but that the respondent did not then nor at any time afterwards deliver the same to the returning officer as required by law.

The respondent presented preliminary objections to the petition, which are sufficiently set out in the judgment.

A summons having been taken out to strike out the preliminary objections,

The Respondent in person showed cause.

Mr. Bethune for petitioner.

RICHARDS, C. J., delivered the judgment of the Court:

In disposing of the matters brought before us in relation to the *North Victoria case* (*ante* p. 584), we expressed our opinion that the question of want of property quali-

* The Judges were the same as in the *North Victoria case* (*ante* p. 584.)

fication in a candidate at the elections for members of the House of Commons, held before the passing of the Act of the last session of the Dominion Parliament, can still be raised in pending cases, and therefore the question of the property qualification of the respondent is now a matter which is to be decided under the petition.

As to the objection taken, that the petitioners allege that the respondent was not seized of lands *and* tenements instead of lands *or* tenements, we do not think the respondent was in any way misled or prejudiced thereby, and in this respect the third clause of the petition may be amended, if the petitioners or their counsel wish it, though it hardly seems necessary.

Then as to the objection to the fourth paragraph of the petition, that it is not stated that any declaration was tendered to the respondent by the elector to make at the time he made the demand, or at any other time. The statute does not seem to require any *tender* of a declaration. What it says is, that before he shall be capable of being elected, the candidate shall, if required, make the declaration; and the Consolidated Statutes of Canada, cap. 6, sec. 36, enacts that such candidate, when personally required to make the said declaration, shall give and insert at the foot of the declaration required of him a correct description of the lands or tenements on which he claims to be qualified according to law to be elected, by adding after the word Canada, "And I further declare that the lands or tenements aforesaid consist of," &c. This latter part of the declaration must undoubtedly be in writing, and must in the very nature of things be prepared by the candidate himself.

The fact that the declaration may be in the alternative, that he holds lands *or* tenements held in free and common soccage, or lands or tenements held in fief or in roture, *as the case may be*, shows that the candidate must make his own declaration. It cannot be tendered to him filled up in the proper form to be made, unless the party knows *how* the qualification he claims to possess is held,

whether in free and common soccage or in fief or in roture.

Taking the enactments together, the reasonable view is that the candidate must prepare his own declaration; it cannot, with any certainty of its being correctly done, be tendered to and demanded from him.

We think we have substantially disposed of the other objection in the *North Victoria case*.

We are of opinion that the preliminary objections in this case must be overruled, and that the petitioners may proceed to prove the allegations in their petition if they can do so.

The petition came on to be tried before Chief Justice Hagarty, at Osgoode Hall, on the 19th December, 1874. At the close of the evidence, the petitioners' counsel admitted that the respondent was qualified at the time of the election, and that the petition might be dismissed. The respondent did not ask for costs.

The CHIEF JUSTICE so ordered.

(9 *Commons Journal*, 1875, p. 36.)

CORNWALL (2).

BEFORE CHANCELLOR SPRAGGE.

TORONTO, *28th December, 1874; 3rd February, 1875.*

DARBY BERGIN, *Petitioner*, v. ALEXANDER F. MACDONALD, *Respondent.*

Preliminary objections—Two elections—Disqualification of candidate—Effect of report to Speaker as to voters—Evidence at second trial of bribery at first election.

An election was held in January, 1874, under the Act of 1873, at which the petitioner and the respondent were candidates, and at which the respondent was elected. This election was avoided on the ground of corrupt practices by agents of the respondent, committed without his knowledge or consent (*ante* p. 547). A new election was held, under the Act of 1874, at which the petitioner and the respondent were again candidates, when the respondent was again elected. Thereupon another petition was presented, charging that the respondent was guilty of corrupt practices at this last election; that he was ineligible by reason of the corrupt acts of his agents at the former election; that persons reported guilty of corrupt practices at the former election trial had improperly voted at the last election; and claiming the seat for the petitioner.

Held, on preliminary objections, 1. That the two elections were one in law; and it was not material that they had been held under different Acts of Parliament.

2. That the respondent was not ineligible for re-election, as the corrupt practices of his agents at the former election had been committed without his knowledge or consent.

3. That the fact of persons having been reported by the Judge as guilty of corrupt practices at the former election, had not the effect of disqualifying them from voting at the second election. The report of the Judge is not as to them an adjudication, for voters are not, in a proper judicial sense, parties to the proceedings at an election trial.

4. But evidence of corrupt practices committed by persons in the interest of both candidates at the previous election, may be given at the trial of the second petition, with the view of striking off the votes of any such persons who may have voted at the second election.

The election held in January, 1874, having been avoided (*ante* p. 547), a new election was held under the Dominion Elections Act, 1874, at which the former petitioner and the respondent were again candidates, and the respondent was again elected.

Thereupon another petition was presented containing the usual charges of corrupt practices, and charging that the respondent was ineligible as a candidate by reason of the corrupt acts of his agents at the former election: that

persons reported guilty of corrupt practices, and persons guilty but not so reported, had voted at the second election, and that their votes should be struck off the poll. The petition claimed the seat for the unsuccessful candidate.

Preliminary objections were filed by the respondent, raising the following questions: 1. Whether the two elections were one in law. 2. Whether the respondent was disqualified. 3. Whether the votes of persons reported should be struck off the poll.

Mr. Bethune, for petitioner, moved to overrule these objections.

Mr. Harrison, Q.C., for respondent, supported the objections.

SPRAGGE, C.—The election now petitioned against was held under the Dominion Elections Act of 1874, the respondent and Dr. Bergin being the candidates. At the next preceding election for the same constituency, which was held under the Election Act of 1873, the same gentlemen were candidates, and the present respondent was returned. His return being petitioned against, the adjudication upon the trial of the election petition was, that the respondent was not duly elected or returned, and that the election was void; and that adjudication, or "determination," as it is called in the statute, having been certified to the Speaker, a writ for a new election was ordered, and a new election had, with the result that I have stated. Preliminary objections have been taken against portions of the petition against the second election.

The 14th paragraph is objected to. It runs thus: "On the trial of the said former petition a great number of persons were reported by the said Judge in his report to the House of Commons as guilty of corrupt practices on behalf of the respondent at the said first election, and a great many persons voted at the said last election who were guilty of corrupt practices on behalf of the respond-

ent at the said former election, who were not reported, and such persons so reported as aforesaid voted at the said election, and a number of votes equal to the number of persons so reported as aforesaid, and so guilty of corrupt practices as aforesaid at the first election, should be struck off the number of votes polled for the said respondent."

This raises two questions—one as to persons who were reported at the trial of the former petition to have been guilty of corrupt practices at the first election, and who voted for the respondent; the other as to persons who voted in the same way, and who were also guilty of corrupt practices, but who were not reported.

The objection is as to the whole paragraph, and raises first the general question, whether corrupt practices by voters at the first election affect their right to vote at the second; and supposing that proposition answered in the affirmative, the second question is as to the class first named—those reported—whether the report is as to them an adjudication that they were at the first election guilty of corrupt practices.

The contention upon the general question on behalf of the petitioner is that the first election having been determined to be null and void, it was in law no election; and that the first and second elections, though two elections in fact, are one election only in law.

The point was fully discussed in the judgment given by Sir Joseph Napier in the *Dungarvan case* (2 P. R. & D. 300), and that judgment is well summarized in Rogers' Treatise on the Law of Elections, 10th Ed., 227, thus: "Where an election has been set aside by an election committee as 'null and void,' the committee, upon the trial of the subsequent election, are at liberty to inquire into any corrupt acts whatever which have been committed at the previous election, after the vacancy, on the ground that although there have been two elections in fact, and two writs have actually issued, yet there never has been a valid return according to the proper exigency

of the first writ; in short, that the proceedings subsequent to the issuing of the first writ, until a legal return has been made to it according to its exigency, constitute in point of law one election, into which the committee are then inquiring. In the words of the learned chairman: 'The party who offends against the prohibition of this Act is disabled to serve in Parliament upon such election, which in a restricted sense would apply only to the election in relation to which the offence shall have been committed. But if this election be subsequently declared null and void, and a new election take place under a new writ in order to supply the vacancy by the due election of a qualified candidate, then on a petition upon this new election against the return of a party who may have committed bribery, &c., at the previous election, which has been set aside as null and void, it may be open to show those previous acts of bribery, &c., as constituting a disqualification of the offending candidate, and disentitling him to be returned upon such new election, because the vacancy still remains until it is supplied by the return of a qualified candidate upon a valid and lawful election, which ultimately takes place, not under but according to the proper exigency of the first writ. In this way the language of the statute is adapted to the case of one entire process of election, ending in a single valid and recognized return of a duly qualified candidate, so as to supply the original vacancy:' *Acc. 2nd Horsham* (1 P. R. & D. 240); *2nd Cheltenham* (*ibid.* 224); *2nd Lisburn* (W. & Br., 233); and cases quoted on pp. 226, 227. All the above mentioned corrupt acts, therefore, if taking place at a former election, operate as a disqualification at a subsequent one, provided the first has been set aside by a competent authority as null and void."

The same view has been taken in other cases of the legal effect of an election being determined by a competent tribunal to be void; and so in the late case of *Drinkwater* v. *Deakin* (L. R. 9 C. P. 626), Lord Coleridge speaks of an election after an election determined to be void,

which he says is "regarded as an adjournment only, or continuance of the election so avoided." In another passage (p. 637), "the second election under these circumstances is but a continuation of the first, the exigency of the writ not being satisfied till there is a good return."

In the earlier case, though still a recent case, of *Stevens* v. *Tillett* (L. R. 6 C. P. 147), Mr. Justice Willes appears to have entertained considerable doubt upon the point. He says (p. 171): "But I do not feel sufficiently confident, in respect of concluding that the first and second proceedings are to be treated as one proceeding, to lay that down in point of law;" and after referring to the *Dungarvan case*, he explains how in subsequent cases a person disqualified for corrupt practices cannot be a candidate for the same place at the next election for the same place (or, indeed, at any subsequent election during the same Parliament), without resorting to the doctrine of an avoided election followed by another election being in law only one election. He explains it by the provisions of the Corrupt Practices Prevention Act, 1854, s. 36, "That if any candidate at any election for any county, &c., shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county," &c., during the Parliament then in existence.

The decision in the *Dungarvan case* proceeded upon the like disqualification created by a previous Act, 5 & 6 Vic., c. 102, where the corrupt practice was "treating." It was the opinion of Mr. Justice Willes that under section 36 of the Act of 1854, a petition might be presented at any time during a Parliament at which corrupt practices had been used. He places his decision in the *Westbury case* (1 O'M. & H. 47, 53) upon that ground; and in *Stevens* v. *Tillett* he says (p. 177): "I apprehend that the 36th section is the pivot now of all these proceedings." It seems to me clear that decisions subsequent to 1854 may properly be referred to that section.

It seems clear, also, that, without that section, corrupt practices previous to an effectual election would not work a disqualification at an election subsequent to it. The same learned judge observes: "As to matters which occurred at the former election, though bribery at the particular election goes to the disqualification of a member, yet I can find no authority at common law that bribery at a former entirely disconnected election would go to the disqualification of a member, and I think it seems to be greed at the Bar that there was no such authority." If it would not go to the disqualification of a member, it is hardly necessary to say that it would not disqualify a voter. We have no provision in our statutes equivalent to section 36 in the Imperial Act of 1854, or the previous Act of 5 & 6 Vic. (which relate to corrupt treating), and therefore the disqualification of voters contended for by the fourteenth objection must rest entirely upon the doctrine propounded in the *Dungarvan case.*

Mr. Harrison, for the respondent in this case, drew a distinction between the case of members and voters—the *Dungarvan case* and other cases cited by Mr. Bethune being cases of members; but the principle of the doctrine obviously applies to the case of voters as much as to that of candidates. If it is the same election as to the latter, it cannot be otherwise as to the former.

Mr. Rogers (p. 227) treats it as a moot point with committees, before the passing of the C. P. P. Act, how far bribery or other corrupt practices under Acts which he enumerates, if taking place at a former election, disqualified a person from being elected or sitting on a subsequent one. I apprehend the learned author did not mean to say that it was a moot point whether a member could be unseated for corrupt practices at a previous one. That was the case in the *Camelford Election case* (Corb. & Dan. 239), decided as long ago as 1819. In that case a distinction was taken in argument between corrupt practices by a candidate and petitioner, and corrupt practices by the candidate returned at a previous election; and it was

said by counsel that in all the cases cited the party who was unseated, or who was declared to be ineligible, had been himself returned in the first instance, and that the return had been subsequently set aside by a judgment of a committee finding that he had been guilty of bribery or treating at such first election. I refer to this argument only to show that it was not denied by counsel for the respondent (and they were counsel of eminence) that corrupt practices at a previous election could be shown in order to unseat, at any rate, the candidate returned, involving the proposition that evidence of corrupt practices at a previous election was admissible, and, if admissible, the Judge who may try the present election petition must receive such evidence.

The weight of authority appears to me to be in favor of receiving such evidence, and I cannot therefore allow the objection to the 14th paragraph of the petition. I must, however, dissent from the proposition implied in it, that the votes given at the previous election of persons reported to have been guilty of corrupt practices at that election be disallowed. I put it in that shape because that would be the effect of striking off an equal number of votes given for the respondent at the previous election. It appears to me to be very clear that no such effect as is contended for is given by the statute, or could in reason be given to the report of the Judge.

In the very elaborate judgment of Sir William Bovill, in *Stevens* v. *Tillett*, the distinction is clearly pointed out between the judicial determination of the Judge, which he certifies to the Speaker, and the report which he is required to make at the same time. After giving a history of the legislation which preceded the Parliamentary Election Act of 1868, from which the Canadian Acts constituting the Judges the tribunals for the trial of controverted elections are taken, he comments upon those clauses of the Act which relate to the determination to be come to by the Judge on the trial, and his certificate of such determination, and to the report to be made under

the Act. I cannot do better than quote his language: "Now this Act of Parliament, which is really the foundation of our jurisdiction, and which declares and must determine what is the effect of reports of the election Judges, makes a very material distinction between what is final and what is not final. For instance, subsection 13 of section 11 declares that the determination of the Election Judge shall be final to all intents and purposes. But that is the 'determination' mentioned in that section, viz., as to who was duly returned or elected, or whether the election was void, that is, by the express terms of the clause, which says that 'at the conclusion of the trial the Judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given, such determination shall be final to all intents and purposes.' The other case in which a decision is to be final is under subsection 16 of the same section, which enacts that a special case may be stated under certain circumstances, which shall be heard before the Court, and that 'the decision of the Court shall be final;' and 'the Court shall certify to the Speaker its determination in reference to such special case.' In those two cases, both of which relate to the determination of the question as to who is to be the sitting member, or whether the election was void, the Act expressly declares that the determination shall be final. That is entirely in accordance with the Grenville Act, and with the 11 & 12 Vic., c. 98. The provisions are almost in words the same. Then, following the provisions of the previous Acts (it having been optional, however, under those Acts with the Election Committee to report on any special matter as they might think fit), subsection 14 of section 11 of this Act says, 'the Judge shall, in addition to such certificate and at the same time, report in writing to the Speaker.' It nowhere says that such report

is to be final. It does not say that the Judge shall determine any particular matter, or that he shall not determine any particular matter, in terms; but it says he shall report first 'whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice.' Then, secondly, 'the names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt practice.' Thirdly, 'whether corrupt practices have, or whether there is reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates.' And at the same time he is authorized to make a special report to the Speaker as to 'any matter arising in the course of the trial, an account of which, in his judgment, ought to be submitted to the House of Commons.' . . . My object in referring to the previous legislation was to show how closely the provisions of the former Acts have been followed in the recent Act of Parliament; and just as a distinction is made in those Acts between the 'determination' of the petition and a 'report' upon other matters, so this Act of Parliament, while it says that the 'determination' of the petition is to be final, contains no such words as to the 'report.' Where effect is intended to be given to the report it is expressly enacted what that effect shall be, but there is nothing in this Act which I have been able to discover that makes the mere 'report' of the Election Judge equivalent to his 'determination.' There is nothing which says that the report is to be final for any purpose whatever except in the particular cases that are expressly mentioned; and the present is not one of them. If Parliament had intended, not only that the determination of the question as to the seat was to be final, but that the report was to be final in other respects, it would have so enacted. But it could hardly have been intended that such a report should be final, looking at the various matters which may be included in it, as stated in the different paragraphs of section 11. If the report

was not to be final under the old Acts, it seems to me that we should be going a long way, and straining the construction of this Act, to hold that it was to be final in this case, or that the parties were concluded by it." The same distinction was taken between the effect of the "determination" by the Judge and his "report," by Mr. Justice Willes and Mr. Justice Keating, who also gave judgment in the same matter.

The question in *Stevens* v. *Tillett* was as to the effect to be given to a "report" of a Judge in relation to the conduct of a candidate at a previous election. In the case before me the report is in relation to corrupt practices by voters, and the case is therefore *a fortiori;* for voters are not in a proper judicial sense parties to the proceedings at an election trial, and to give the effect contended for to the report concerning them would be making an adjudication affecting their franchise behind their backs. I apprehend that in order to affect them the report would have to be laid before the Attorney-General with a view to the prosecution of the persons named in the report, as was suggested by Sir Wm. Bovill (p. 158), in relation to individuals reported by an Election Committee to have been guilty of corrupt practices.

My opinion, then, upon the 14th objection is that it is not tenable in its present shape; that so much of it as relates to voters reported to have been guilty at the first election of corrupt practices, and states as a consequence that an equivalent number should be struck off the number of votes polled for the respondent at the second election, must be overruled.

But further, my opinion is that upon the trial of the petition now presented against the second election, evidence may be given of corrupt practices at the first election, and I apprehend that it will be open on the other hand to the respondent to show corrupt practices on the part of voters for the petitioner. It will be in substance and effect a scrutiny so far as the petitioner's case under the 14th paragraph of his petition is concerned.

The second objection taken by the respondent is to the 16th paragraph of the petition, and to so much of the 17th and 18th paragraphs as charge that the respondent was ineligible to be elected by reason of his former election having been avoided; the petition not charging or showing any other facts or circumstances which would cause the respondent to be ineligible or disqualify him to be a candidate at the said election.

The point argued upon this objection is the same as was raised at the *London case* (*ante* p. 560) before the Chief Justice of the Common Pleas, and reserved by him for the judgment of that Court (24 C. P., 434); and the same as was raised also at the *Kingston case* (*ante* p. 625) before the Chief Justice of Ontario, and overruled by him.

At the trial of the first petition I determined that the election was void by reason of the corrupt acts of agents; that was my adjudication. I at the same time, in pursuance of the Act, reported to the Speaker that no act of corrupt practice had been proved before me to have been committed by or with the knowledge and consent of the respondent. His ineligibility therefore must rest upon my determination that the first election was void by reason of the corrupt acts of agents.

A point occurred to me at the argument of these objections—and I stated it at the time, but it was not urged by counsel—that if the two elections that have taken place in fact constitute one election in law, the respondent has it determined against him that his election was void by reason of the corrupt acts of agents. He goes to the poll a second time, and on the second occasion with that adjudication against him. In the case of voters there has been no adjudication; but if the fact of corrupt practices at the first election be established in evidence, their votes (or an equal number) will be struck off on the short ground that the corrupt practice at the first election disqualified them from voting at the second. If as to these voters there had been an adjudication, an equal number of votes would be struck off now. It seems to

me, I confess, to be a logical sequence that the candidate's seat is forfeited by the corrupt practices of his agents. Or it may be put in this way: Suppose no adjudication against the candidate, then candidate and voters would stand upon the same footing in relation to what took place at the first election; in fact, give to corrupt practices at that election the same effect as to the respondent, he being the candidate at the first as well as the second election, as we give in regard to voters, would not his seat be forfeited upon proof of corrupt practices at that first election? But there is, as to him, an adjudication, and so the fact of those corrupt practices requires no further proof.

Logically, I confess, I see no escape from this conclusion; but the answer may be this: The doctrine that a void election is no election, and that such election followed by an effectual election is in law but one election, prevailed before the passing of the C. P. P. Act, which was passed in 1854. That Act rendered a candidate who should be found by an Election Committee guilty of corrupt practices, by himself or his agents, incapable of sitting for the same county, city, or borough during the Parliament then in existence. That Act, it is true, consolidated as well as amended the law relating to elections, but the provision that I have cited was not, I believe, contained in any previous Act, except that relating to corrupt treating, referred to in the *Dungarvan case;* and while there has been legislation on the subject in the Parliament of the late Province of Canada, and of the Dominion, and of the Legislature of Ontario, since the passing of that Act, no similar provision has found a place in any Act on the subject.

The carrying out of the doctrine to its full extent would have the same effect, for if the first election, being void, is no election, and the adjudication against the candidate would operate to unseat him when again returned, it would have the same effect at the third or any subsequent election, at any rate during the same Parliament,

and so the candidate would be rendered incapable of being elected by the operation of this doctrine; while the Legislature has abstained, while adopting several provisions of the Imperial Act of 1854, from adopting the one to which I have referred; and in the Dominion Act of 1874, under which this second election was held, the "punishment for corrupt practices" is expressly defined, and it is only where it is proved that there has been any corrupt practice with the actual knowledge and consent of the candidate, or a conviction for the misdemeanor of bribery or undue influence, that any penalty is incurred beyond the avoiding of the election.

The enactment obviates difficulties in the future, but the question raised is whether the respondent was not ineligible by reason of what had occurred at the previous election, which took place before that Act was passed. Looking at the legislation to which I have referred since the passing of the Imperial Act of 1854, and the other considerations to which I have adverted, I think the proper conclusion is that the respondent was not ineligible.

I find that I have omitted to notice the contention of Mr. Harrison, that the doctrine to which I have several times referred cannot apply to this case because the first and second elections in fact were under different Acts of Parliament—the Act of 1874 repealing that of 1873, and substituting other provisions in its stead.

Mr. Bethune directed my attention to the Interpretation Act as an answer; and it appears to me that subsection 35, and the subsequent subsection, of section 7 are an answer to the objection. Besides, the Act of 1873 is not wholly repealed. Elections held, rights acquired, and l bilities incurred before the coming into force of the t of 1874, are expressly excepted. I cannot agree with Mr. Harrison's contention upon this point. The point that the respondent was ineligible for re-election upon the 18th section of the Act of 1873, cap. 27, was but little pressed by Mr. Bethune. I thought certainly that it would be a strained construction to give to that section

to hold a candidate ineligible in the absence of personal wrong, and only by reason of the acts of agents. The learned Chief Justice of Ontario has held in the *Kingston case* that in such a case no disqualification was created, and the Court of Common Pleas has since, in the *London case*, expressed the same opinion.

I think this is not a case for costs to either party.

SOUTH NORFOLK.

Before Chief Justice Draper.

Simcoe, *24th to 26th June, and 5th July, 1875.*

John Decow, *Petitioner*, v. William Wallace, *Respondent.*

Amendment of particulars—Delay—Agency—Bets—Bribery—Treating—Candidate acting as agent.

On an application by the petitioner to amend the particulars by adding charges of bribery against the respondent personally, and his agents, his attorney made affidavit that different persons had been employed to collect information; that the new particulars only came to his knowledge three days before the application; and that he believed they were material to the issues joined.

Held, that as it was not shown that the petitioner or the persons employed could not have given the attorney the information long prior to the application, and as it was not sworn that the charges were believed to be true, nor were they otherwise confirmed, and as the amendment might have been moved for earlier, the application should be refused.

The respondent in his evidence stated that he objected to committees; that he knew certain persons were his supporters, and believed they did their best for him, but he did not personally know that they acted for him. Other evidence showed that these persons took part in the election on behalf of the respondent; some spoke for him at one of his meetings; and one of them stated that he and some of the others canvassed for the respondent, and that he gave the respondent to understand he was taking part in the election for him.

Held, that as it did not appear that any one of these persons was authorized by the respondent to represent him, and as they did not claim to have any such authority from him, but supported the respondent as the candidate of their party, the said persons were not agents of the respondent for the purposes of the election.

Semble, 1. That if a candidate who had appointed no agents was aware that some of his supporters were systematically working for him, and by any act, or forbearance, could be fairly deemed to recognize and adopt their proceedings, he would make them his agents.

2. That if a candidate in good faith undertakes the duties which his agent might undertake, the acts of a few zealous political friends in canvassing for him, introducing him to electors, attending public meetings and advocating his election, or bringing voters to the poll, would not make such candidate responsible for prohibited acts contrary to his publicly declared will and wishes, and without his knowledge and consent.

Money was given to certain voters to make bets with others on the result of the election, but as there was no evidence of a previous understanding as to the votes, such bets were not bribery. The practice of making bets on an election condemned as like a device to commit bribery.

Treating at an election, in order to be criminal, must be done corruptly, and for the purpose of corruptly influencing the voter.

Remarks on the evidence of agency.

At the general election held on the 22nd and 29th January, 1874, John Stuart was elected for this constituency, but on a petition alleging corrupt practices by his agents, the election was avoided (9 *Commons Journal*, 1875, p. 13). A new election was held on the 16th December, 1874, at which the respondent was elected. A petition was then presented against the return of the respondent, containing the usual charges of corrupt practices.

Mr. C. J. Fuller and Mr. H. S. Hill for petitioner.

Mr. Tisdale, Q.C., *and Mr. Robb*, for respondent.

At the close of the second day's evidence (25th June), the petitioner's counsel applied for an order to file additional particulars, upon an affidavit of the attorney on the record, sworn that day, stating that he had used due diligence in preparing the particulars under the order of Court, dated 3rd April, 1875; that for the purpose of preparing such particulars different parties had been employed to collect information; that the new particulars (which were annexed to the affidavit) only came to the attorney's knowledge since Tuesday, the 22nd June inst., and that the cases mentioned were, he believed, material to the issues joined. The cases were: charges of bribery against the respondent personally and his agents. On the following morning the application was disposed of as follows:

DRAPER, C.J.A.—I refuse the application, considering the delay that has taken place. It no doubt is to be assumed that the attorney has just been informed of these matters; but it is consistent with the affidavit that his informants were parties who could have given him the information long ago, and that from various causes may have withheld it from the attorney's knowledge. The particulars may, for all that is shown, have been well known to those who gave the attorney the information; the petitioner may have known them for weeks or months. Then, for all that is sworn, the statements may be the merest fabrications. The attorney does not swear that be believes them, nor does any other person in any way confirm them. It is not sworn that there is a reasonable ground for believing that they can be proved. The information is sworn to have been received since Tuesday, and no application until Friday evening, on which day the affidavit was sworn. Apparently it might have been made earlier. Delay, expense, and inconvenience ought not to be caused at so late a period, unless upon a strong and clear statement of the existence in fact of sufficient grounds.

During the trial, evidence was given of several alleged acts of bribery and treating, which are sufficiently set out in the judgment. The following is taken from the learned Judge's notes of the evidence as to the agency of the parties named:

Dr. N. O. Walker: I took part in the last election. I gave respondent to understand I was taking part for him. I know Mr. Ozias Ansley; he was also working for respondent. I know that Edward Hammond was canvassing for respondent. Never met a committee on this election, and there was no organized committee for respondent at this election.

Cross-examined: I spoke for respondent at two or three meetings, and if I met with electors I spoke to them. Ansley and the others I have named acted as I did.

James W. Stewart: I know Hammond, Ansley, David Sharp, and Dr. Walker. They took part in the election on behalf of the respondent. They were at respondent's meeting at Port Dover the night previous to the election.

Simon Belch: I was at Port Dover at a public meeting. Tisdale and Dr. Walker both spoke in favor of Wallace.

Edward Hammond: I was at respondent's meeting at Port Dover. I think I asked three persons to vote for him.

Robert R. Reid: I had a list of voters. I attended two meetings where the respondent spoke. There was no committee formed. I was a member of a committee of Wallace's friends at a previous election. We met after the meeting to choose delegates, and looked over the list to see if any reformers' votes could be objected to. We looked over the voters' lists for both elections. I don't know that the respondent was aware I was moving for him. I made no reports to any one of my proceedings.

William Wallace (respondent): I know Hammond and Ansley. I do not personally know they acted for me. I object to committees, but I trusted the whole party. I know that Ozias Ansley, Dr. N. O. Walker, and Edward Hammond and Tisdale were my supporters. I was pleased to have them all vote for me. I believe they all did their best for me.

Cross-examined: I held about forty meetings. Wherever the subject came up I invariably charged my supporters and friends to be most careful not to infringe the law.

DRAPER, C. J. A.—The first question which arises is, whether certain persons hereinafter named were proved to be the respondent's agents, so as to render him liable for their acts, as if he had personally consented to or taken part therein. The term "agent" carries with it the idea of authority given by the candidate to some person to act in his name and in his behalf in affairs con-

nected with the election; and it is an established principle that where a person has employed an agent for the purpose of procuring his election, such person is responsible for the act of the agent in any corrupt practice, though he not only did not intend or authorize it, but even had in perfect good faith done his best to prevent it; and it has been held that every instance in which it is shown that, either with the knowledge of the candidate, or to the knowledge of an agent employed by the candidate, a person acts in furthering the election for him by trying to get votes for him, is evidence tending to show that the person so acting was authorized to act as his agent. The weight and cogency of such evidence will depend upon the circumstances of each case; but it is evidence, and as such must receive proper attention. Their canvassing, that is, making efforts to obtain votes and interest and support, is evidence of agency, but depends for force and weight upon its extent and urgency. If done at the suggestion of the candidate, it would be direct proof of agency; if merely voluntary, it ought not to be so regarded. Going round the county, and attending meeting after meeting, and speaking at such meetings, is strong evidence. Attending one meeting and speaking there, would be an isolated act, and, by itself, of little weight. These and similar acts, being repeated, are regarded as sustaining the inference that they are done with the knowledge and at the request of the candidate who thus employed the party as his agent. On the other hand, the candidate may deprecate such individual agency from the fear of indiscretion, or even worse, on the part of supporters, who regard the immediate result without sufficient scruple as to the means, and without reflecting upon future consequences.

In the present case the respondent was called as a witness by the petitioner. He stated his objection to committees, and it did not appear there was one formed on his part and with his knowledge; he said he held about forty meetings, and invariably charged his friends

to be careful not to infringe the law; he put in papers containing addresses, to which his name was attached, with a view of showing that he depended on a general appeal to the constituency rather than any application to individuals; he stated in evidence that he trusted to the whole party for support, and referring to those who were signalized on the trial as having acted in a manner which justified the petitioner in treating them as agents, he said he knew they were all his supporters, was pleased to have them vote for him, and believed they all did their best for him; but nothing stronger was elicited from him to identify him with their acts in promoting his election. He was not even asked whether he was from time to time informed what they were doing or proposed to do.

I do not doubt that if a candidate, who has appointed no agents, is made aware that some of his supporters are systematically working for him, and by any act (or perhaps even by forbearance to interpose) can be fairly deemed to recognize and adopt their proceedings in order to further his election, he makes them his agents, and must take the consequences. A contrary rule would encourage fraud and corruption, and facilitate evasions of the law.

Nearly all the cases set out in the particulars, to sustain which evidence was given, are charged to have occurred in the south-eastern part of this electoral division; the places named are Port Dover, the townships of Charlotteville and Woodhouse, and a place called Dog's Nest, at or near which were two taverns, one kept by George Mitchell, the other by one McQuade. The persons who were represented, on the part of the petitioner, to have acted as agents for the respondent were Edward Hammold, David Sharp, Ozias Ansley, and Dr. N. O. Walker. They are all generally charged with having canvassed for the respondent, with having taken part in the election on his behalf, and having worked actively for his election. Many other parties were named in the particulars as parties to alleged corrupt practices, but with regard to these

latter persons, there was no evidence beyond their apparent earnestness to secure the respondent's election, on which to fasten the character of agents upon them, so as to make him responsible for their acts.

As to the other four persons named, it is to be remarked that it does not appear that either of them were authorized by the respondent to represent him for any purpose; nor that they ever professed to do, as far as I have gathered from the evidence. They were all members of one political party, had previously supported the respondent, and did so at the present election as the candidate of that party, without reference to personal feelings. None of their acts have been traced to the solicitation or direction of the respondent, who does not appear to have interfered in any way with their proceedings in regard to the election. Each seems to have canvassed independently of the other, acting on behalf of the political party to which they belonged, but independently of the respondent and of each other.

There were some matters of an apparently dubious character which I deem it fitting to notice. One was between a witness named Myers and Mr. Ansley, in which I find the following facts: On the polling day, and soon after one Frederick Myers had voted, Ansley handed him a $5 bill to go and bet on Wallace. There was not the slightest evidence of any previous understanding between them; but Myers took the money, and betted it with Joseph Bell, that Wallace would be elected. The two sums were put into the hands of a third party to abide the event. Bell raised objections to its being paid over, and it was held until May last, when Myers got it and paid it all to Ansley. When giving the $5 to Myers, Ansley said if Myers lost the bet it would cost him nothing, and if Myers wanted more money to bet to come to him and get it. One Martin, who said he was present, represented the matter rather differently; but on the weight of evidence I find the facts as above stated. Some considerable time afterwards Myers got the money from

the stakeholder, and paid the $10 to Ansley, to whom, as I concluded, it rightly belonged. Myers only got the money back in May last, before the Queen's birthday.

Martin, above named, also stated that he received $5 from Hammond to bet that Wallace would be elected; that if he won he was only to return the $5 to Hammond; and that if he betted this money and desired to bet more, to come back and he (Hammond) would give it to him. There was, however, no particulars setting out this as a charge, and objection being taken, the matter was dropped. Moreover, his statements were contradicted.

There was also a somewhat similar matter advanced, in which it was sworn by Joseph Bell that on the polling day he heard Ansley say to one Jacob Krell: "Here's $5—putting a bill into Krell's hand—go in and vote for Wallace, and bet that Wallace will be elected, and if he is not elected you will not lose anything, and if he is elected you can keep the $5 you win; all I will ask is the $5 I give you;" and that Krell took the money, and gave it back to Ansley before he went in to vote. Krell denied that Ansley gave him any money to bet with; he was a German, and could, as he said, neither read nor write. Ansley denied upon oath that he ever put $5 into Krell's hands, or even told him to bet on Wallace. This denial from both Krell and Ansley put an end to this case, which rested on Bell's assertion of what he had heard and what Krell told him. There is, however, further evidence that Ansley offered money to Krell to bet with, but the witness could not, or would not, say that Krell took it; and of another witness who also swears that Ansley offered money to Krell, saying, "Take it and bet;" but did not say that Krell took it.

I cannot help saying that this practice of making such bets, when on a contingency by which the so-called borrower may win and cannot lose, looks to me very like a device to commit bribery; and if the transaction with Myers had been proved to be of that character, and to have been entered into and agreed upon befor he voted,

as at present advised, I should have held it to be bribery. The positive statement that Myers had voted, and that the arrangement for betting was subsequent thereto, and that the whole money paid over by the stakeholder was given to Ansley, is, however, sufficient to repel the charge, though it may leave doubt and suspicion behind.

There is also a matter with which Mr. Hammond is connected, which is sufficiently met and explained by the evidence; but it seems to me unfortunate that it should have happened just at the time of the election. According to the statements of the witnesses, Mr. Hammond had become indebted in the sum of $18 to Frederick Myers for teaming with one horse and a single waggon, drawing sand, tan bark, &c. The account had begun some six months before the election. Myers' explanation as to how he kept the account and rendered a memorandum of it, were somewhat confused, and he failed in an attempt made in Court to explain it. But he said that shortly before the election he met Hammond, who told him he ought to vote for Wallace. Myers had at the previous election voted the other way. Hammond had asked him the amount a week before, and on the day before the polling gave him $5, and told him he could bet it on the election, which he did, and won on the next day. Hammond paid him the remaining $13, and he never directly or indirectly returned any part to Hammond. He had recently talked with Ansley and with Hammond about his transactions with them. He told Hammond that people were writing about his getting money from Hammond, who laughed and said, "It was your own money I paid you." Hammond in his evidence confirmed Myers' statement, and said he was satisfied with the memorandum which Myers gave him.

As another proof that these four persons were to be deemed agents of the respondent, acts of treating during the election, and especially on the polling day, were charged upon them. I cannot say that there was no foundation for these charges; it would seem from the

evidence to be an inveterate habit, when people in country places meet on public occasions, that they should resort to the taverns to drink together. One after another invites his friends, or, as is commonly expressed, "calls up the crowd" to the bar to drink at his expense. This has been a general practice at election times, and, as was proved in this case, is at times followed without reference to political differences. But to understand the bearing of such a custom on this election, we must refer to the Dominion Election Act, 1874, 37 Vic., cap. 9, sec. 94, which enacts that every candidate who corruptly, by himself, or by or with any other person on his behalf (which includes agents), either before or during the election, gives or is accessory to giving meat, drink, refreshment, or provision, to any person, for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote, shall be deemed guilty of the offence of treating, which by sec. 98 is declared to be a corrupt practice. The respondent was not more proved guilty of this than of other personal charges; and, if found guilty, it must be through the acts of his agents. The consequence of committing this offence by a candidate or his agent, whether with or without the actual knowledge or consent of the candidate, is that his election, if he be elected, shall be void. It is not, however, the simple act of treating, but the intention with which that act is committed, which gives it the criminal character, and which subjects the candidate to the loss of the seat. It must be done corruptly, and for the purpose of corruptly influencing the voter.

I have carefully considered the evidence in connection with this language. If the Legislature meant that the act of treating a voter before and during an election constituted the offence, they need not have added the corrupt intent to obtain a corrupt influence. More than the act of treating has to be proved; and, therefore, to stop at a tavern on the way to the poll on a winter's day or after a long drive, and to get meat and drink at the

expense of the candidate, is but a part of the case; and to it must be added something to establish that the thing was done corruptly. And this is not, as appears to me, to be inferred without some evidence of solicitation as to the voting connected with the act of treating; and this has been generally overlooked.

But if the treating took place in the candidate's absence, as was assumed in the instances proved, the fact of agency must be established. I do not pretend to lay down any universal test or rule of deciding, but I cannot think that a candidate must of necessity be placed in danger of ultimate defeat by the indiscretions of a few of his supporters who will risk the use of doubtful, if not illegal, means to obtain a present success. I do not see that he may not legally be his own agent for all the purposes of the election, except those covered by the 121st section of the Act already referred to. The 78th section of that Act recognizes the right of the candidate in that respect, and, with the exception noted, authorizes him to undertake the duties which an agent appointed by him might have undertaken. If he does so in good faith, I do not think that the acts and exertions of a few zealous political friends in canvassing for him, or even with him, to introduce him to electors to whom he was a stranger, or attending party meetings and advocating his election, or bringing up voters to the poll, can make him responsible for prohibited acts contrary to his publicly declared will and wishes, and without his knowledge as well as without his consent.

I think that the respondent has proved, both by his acts and his public declarations, made from the time he first announced his candidature, that he meant to be his own agent, and that he had pursued that course, and that he is not connected with any of the matters complained of as done by the persons alleged to be his agents; and that none of the charges advanced against him as the acts of his authorized agents are so substan-

tiated as to warrant me in holding that his election and return are void.

I therefore dismiss the petition with costs.

(10 *Commons Journal*, 1876, p. 29.)

NORTH VICTORIA (2).

Before Mr. Justice Wilson.

Lindsay, *13th to 16th and 24th April, and 4th May, 1875.*

Hector Cameron, *Petitioner*, v. James Maclennan, *Respondent.*

Marking ballots—Votes tendered but rejected—Parol voting—Agency—Dinners to voters on polling day—Corrupt practices.

The following ballots were held valid :

(1) Ballots with a cross to the right just after the candidate's name, but in the same column and not in the column on the right hand side of the name. (2) Ballots with an ill-formed cross, or with small lines at the ends of the cross, or with a line across the centre or one of the limbs of the cross, or with a curved line like the blades of an anchor.

The following ballots were held invalid :

(1) Ballots with a single stroke. (2) Ballots with the candidate's name written thereon in addition to the cross. (3) Ballots with marks in addition to the cross, by which the voter might be identified, although not put there by the voter in order that he might be identified. (4) Ballots marked with a number of lines. (5) Ballots with a cross for each candidate.

Quære, whether ballots with a cross to the left of the candidate's name should be rejected, as the deputy returning officer is not bound to reject such ballots under sec. 55 of the Dominion Elections Act, 1874.

The names of certain persons who were qualified to vote at the election appeared on the last revised assessment roll of the municipality, but were omitted from the voters' list furnished to the deputy returning officer and used at the election. They tendered their votes at the poll, but their votes were not received ; and a majority of them stated to the deputy returning officer that they desired to vote for the petitioner. The petitioner had a majority without these votes.

Held, by the Court of Queen's Bench (affirming *Wilson*, J.), no ground for setting aside the election.

Semble, per Wilson, J., 1. That, though the only mode of voting is by ballot, if it became necessary to decide the election by determining the right to add these votes, it should be determined in that manner most consistent with the old law, and which would have saved the disfranchisement of electors, and the necessity of a new election.

2. If the right of voting can only be preserved by divulging from necessity for whom the elector intended to vote, the necessity justifies the declaration the elector is forced to make, as there is nothing in the Act which prevents the elector from saying for whom he intends to vote.

3. An elector duly qualified, who has been refused a ballot paper by the deputy returning officer, cannot be deprived of his vote; otherwise it would follow that because the deputy returning officer had wrongfully refused to give such elector a ballot paper, his vote would not be good in fact or in law.

One P., a tavern keeper, took the petitioner's side at the election and at a meeting called by the petitioner, at which he was appointed chairman. Notices of this meeting were sent by the petitioner to P. to distribute, some of which P. put up at his house and some he sent to other places. On polling day P. desired to give a free dinner to some of the petitioner's voters, and asked the petitioner if he might do so. The petitioner did not approve of it in case it should interfere with his election, and warned P. that although he was not his (petitioner's) agent, he would rather he should not do it. P., notwithstanding this, paid for free dinners to 40 of the petitioner's voters.

Held, by the Court of Queen's Bench (affirming *Wilson*, J.), 1. That P. was not an agent of the petitioner.

2. That the giving of free dinners to a number of electors who had come a long distance in severe winter weather, in the absence of evidence that it was done for the purpose of influencing the election either by voting or not voting, or that such electors voted, was not a corrupt act.

The petitioner was held entitled to the general costs of the petition, except as to the cases of the voters whose names were not on the voters' lists, and as to the scrutiny of ballots.

The former election having been avoided *(ante* p. 612), a new election was held, at which the same parties were candidates. The respondent was declared elected by a majority of three votes. The unsuccessful candidate thereupon filed a petition containing the usual charges of corrupt practices, and claiming the seat on a scrutiny of votes.

The Petitioner in person and Mr. F. D. Moore for petitioner.

The Respondent in person.

At the conclusion of the evidence the petitioner abandoned the charges of corrupt practices, but claimed the seat on a scrutiny of the ballots.

The respondent contended that he was entitled to hold the seat upon a scrutiny, and that the petitioner by his agents, had been guilty of corrupt practices.

The general facts of the case are set out in, the arguments of counsel, the judgment of Mr. Justice Wilson, and in the report of the case in appeal to the Court of Queen's Bench (37 Q. B. 234).

Mr. Maclennan, Q. C. (the respondent): The majority in favor of the respondent is said to be only three, and supposing that the result of the scrutiny is against him by a few votes, it is clear the election was wholly void, because as many as fifteen or sixteen persons who were duly qualified to vote, and who had endeavored to vote, had been deprived of the power of voting, and had been prevented from voting by the omission of their names from the copies of the voters' lists furnished to the deputies. If these men had voted, the result might have been different. It could not be said how they would have voted, because until the ballot is marked a man may change his mind, and he may vote, and the Ballot Act is for the purpose of enabling him, if he think fit, to vote, contrary to his expressed intention. The votes cannot now be added, and the result is the disfranchisement of a sufficient number of electors to turn the scale. To hold otherwise would be to put the election in the power of the Returning Officer or the Clerk of the Peace: Wordsworth on Elections, 27; Heywood on Elections, 511.

Peters' act was illegal, and a misdemeanor under sections 87 and 90 of the Election Act, and was a corrupt practice which affected the petitioner under section 94. Peters furnished dinners at the polling place for 40 electors at his own expense, and the only question was whether that had been done *corruptly*. Corruptly meant "with the motive or intention of affecting the election, not necessarily going as far as bribery:" *Launceston case*, (30 L. T. N. S., 831). The time, the place, all the circumstances favored the corrupt motive. Peters admitted that many of the electors were strangers to him. He was an active partisan, and had done all he could for the petitioner, Cameron, in the election; was chairman of an election meeting called by the petitioner at this very polling place, had spoken there, drove him home to his hotel afterwards, and on the way discussed the propriety of those very dinners. The discussion was renewed on a subsequent occasion, when, on the petitioner saying that he could

be no party to it, Peters proposed to do it at his own expense. The petitioner told him he could not prevent him, but did not want him to do it, and would rather he did not do it. All this clearly showed that both the petitioner and Peters considered it a matter relating to the election, and the doing or not doing of which might affect it favorably or otherwise. On the election day Peters was on the ground early, and distributed his dinner tickets through a friend who knew the electors. It is not only clear the motive was to affect the election, but it must have done so in fact. There were in all 112 votes polled there—49 for Cameron and 63 for Maclennan. It is plain that the distribution of these tickets must have tended to make the petitioner popular, and to create a favorable impression towards him. Besides, Peters carried there several bottles of liquor which were consumed among the electors, and there is evidence of canvassing at least one voter over a glass of whiskey. The corrupt character of the act is therefore plain, and the agency of Peters is equally clear. His presiding and speaking at the election meeting, called by the petitioner and at which he was present, would alone be sufficient to establish the agency: *per* Justice Keogh, *Galway (county) case* (2 O'M. & H. 54, 1872). The notices for this meeting were sent by the petitioner to Peters to be distributed, and they were so. But here there were other circumstances of the strongest kind, especially the repeated discussion with the candidate of the expediency and propriety of the very act complained of as an election move. It was in fact counsel taken between them as to a means of promoting the election. The result of the decisions on the subject of agency is, that an agent is a person exerting himself in the election with the knowledge and approval of the candidate, and the result is that Peters was an agent for whose acts, to the extent of disqualifying him from taking the seat, the petitioner was responsible.

The act of Peters has, however, another very important bearing under section 73; a vote must be taken from the

petitioner for every one of the party who got his dinner free of charge by means of the ticket issued by Peters. This section provides that one vote must be struck off for every elector proved to have been treated. The proof is clear that the dinners were intended for voters. The issue of the tickets made every man's dinner secure long before the time for procuring it. The tickets were all used, and all returned by Mr. Ashby to Peters. The conclusion is that 40 voters dined free. The act is the same as if 40 sums of money instead of 40 tickets had been distributed. It is not necessary to prove in detail that the 40 ticket-holders actually voted—that is the fair and only inference that can be drawn from the evidence. There were 49 voters here for the petitioner. The tickets were sufficient for nearly 80 per cent. of them. If it were a question before a jury the evidence would be clearly sufficient to warrant the conclusion contended for. This test was actually applied in the *Boston case* (31 L. T. N. S. 831, 2 O'M. & H. 161, L. R. 9 C. P. 610). If the forty voters are taken off, then the respondent is entitled to retain the seat, being put in a majority of 37, and the votes left off the lists are not numerous enough to affect the election.

Mr. Cameron, Q. C. (the petitioner), *and Mr. F. Osler, contra.*

It is not open to the respondent to make use of the first point in his argument. The fourth clause of the list of objections delivered to the petitioner by respondent had set forth that divers persons were ready to vote at the said election, and had intended to vote for the respondent, but their names were omitted from the certified copy of the voters' list; and now when the petitioner had succeeded in proving that twelve or thirteen names had been omitted from the voters' list, that they had tendered their vote for him, and had expressed their intention and desire to vote for him, the respondent endeavored to take the benefit of those errors made against the petitioner, and maintained that the whole election was void. This

was a most unjust argument; for he had shown that if these errors had not been made in the lists, his majority would have been greater than the ballots gave him. There is nothing in the Act to show that an elector may not state aloud in the polling place, after or before an election, or in court, how he would vote, or had voted. The Ontario Act is more strict, but the 77th section was the only one in the Dominion Act. [WILSON, J.—Supposing he should show the ballot?] The question is whether that would make his ballot bad or not. He may tell any one he likes. He is not to show his ticket; that is all.

Peters' act was not done with a corrupt intent. It devolved upon respondent to show that it was so done, but this has not been shown; on the contrary, all the circumstances show that the alleged treating, which appeared to have been done on a single occasion, was done without any corrupt intent, and in such a way as to lead to the inference that it was not intended to influence votes: as to this see the definition of the word "corruptly" as given in the *Launceston case* (30 L. T. N. S. 831). Peters was not an agent for whose acts the petitioner was responsible, and the case is distinguishable from the *Boston case* relied upon by the respondent. As to the taking off the 40 votes, that cannot be done. There was no proof that any of the persons who had voted had been bribed or in any way corrupted by being given the dinner, which was almost an act of charity under the peculiar circumstances of the weather, and the distance the voters had come. It depended on the questions of agency and of corruption, and the case fails in those particulars.

WILSON, J.—The points to be determined in this case are:

1. Whether, on an inspection of the ballot papers which were rejected by the deputy returning officers at the polls, and accordingly as it might seem proper they should be allowed or disallowed, the majority of the whole poll was in favor of the petitioner or the respondent.

2. Whether electors whose names are on the original rolls from which the lists for taking the polls were made, but whose names were by some mistake or otherwise left out of these copies, and who had good votes, and were entitled to vote at the said election, and who claimed to vote, and desired the deputy returning officers to allow them to vote, but who were refused by the deputy returning officers to be furnished with ballot papers for the purpose of voting, and whose tender of votes was refused, could now, in any case, or under any circumstances, be added to the poll of either party.

3. Whether one William Peters was the agent of the petitioner, to render the petitioner answerable for the acts, and consequences of the acts, of Peters in procuring and paying for forty dinners for the petitioner's supporters and voters on the polling day, near to the polling place of the Carden poll at the election, and in taking to the same place a small quantity of whiskey for the use of the voters of the petitioner.

4. Whether, if William Peters was to be considered the agent of the petitioner, the acts of Peters were acts of treating, or bribery and corruption, within the meaning of the statute. If Peters were the agent of the petitioner, and if the act of Peters as to the dinners was treating within the provisions of the statute, then such a number of votes must be taken from the poll of the petitioner that the sitting member would be left greatly in the majority, notwithstanding all other additions which the petitioner could make to his poll, and he would be entitled to retain his seat.

As to the first question, relating to the ballots, the facts showed that the respondent was returned as the member-elect by a majority of three votes, and that there were thirty-nine rejected ballots. Two of that number, both parties agreed, were rightly rejected. The rejected ballots upon which evidence was given were the remaining thirty-seven. These thirty-seven rejected ballots may be classified as follows:

(1.) Those which were marked with a cross in the division or compartment of the ballot paper on which the candidate's name is put; and to the right hand of—that is, *after*—the candidate's name. For Cameron, Nos. 1, 2, 3, 8, 16, 37; for Maclennan, none.

(2.) Those marked on the same compartment to the left hand of—that is, *before*—the candidate's name. For Cameron, No. 14; for Maclennan, none.

(3.) Those marked on the same compartment above or before the candidate's name. For Cameron, Nos. 4, 5; for Maclennan, none.

(4.) Those marked with a mere line, vertical, horizontal, or diagonal; and whether the line is in the compartment where the name is, or in the column to the right of it. For Cameron, Nos. 9, 11, 17, 18, 20, 34; for Maclennan, No. 27.

(5.) Those marked with a cross to the left hand side—that is, in *front*—of the candidate's name in the left column. For Cameron, Nos. 12, 13; for Maclennan, Nos. 21, 25, 26, 30.

(6.) Those marked, not with a proper cross, but having some addition to it, as strokes, which make the cross look like an X, or having lines along the top and bottom of the cross, or a line across the centre of it, or an additional stroke on one arm of the cross, or the form being somewhat like an anchor. For Cameron, Nos. 6, 7, 19; for Maclennan, Nos. 23, 24, 29.

(7.) Those marked with a proper cross, but having some additional mark by which it was said the voter could be identified. For Cameron, No. 4; for Maclennan, Nos. 28, 32, 33.

(8.) Those having no cross, but the candidate's name being written in full or in part, or some letters or initials put in *place* of the cross. For Cameron, Nos. 35, 36; for Maclennan, No. 22.

(9.) One which is marked by a number of lines. For Cameron, none; for Maclennan, No. 31.

(10.) There is one, No. 15, which has a cross for each candidate—making a total of 37; accounting for the whole number of rejected ballots.

I held at the trial, and I am of the same opinion still, that class No. 1, which is composed of crosses to the right hand side of the candidate's name, contains good votes, for, within the very words of the statute, they are "on the right hand side, opposite the name of the candidate;" and though they are in the compartment where the candidate's name is printed, and not in the column to the right of it, which was manifestly intended as the place of the cross, this is of no consequence, for the statute does not say the cross should be put in the column on the right hand of the name, but merely on the right hand side of the name, and opposite it. The two cases referred to at the trial, the *Athlone case* (2 O'M. & H. 186) and the *Wigtown case* (2 O'M. & H. 215), are directly in favor of this view. There is in reality, however, no decision required on the point. The statute has been literally complied with.

Then I also was of opinion at the trial, and I am so still, that the slightly ill-formed crosses contained in class six should not be rejected. It would be too rigid a construction of the statute to apply to it which would exclude a vote and disfranchise the voter because he made a cross with small lines at the ends of the cross, or put a line across the centre of it, or upon one of the limbs of it, or because, in his hurry or confusion, or awkwardness with the pencil, he did not draw two straight lines, but curved one of them so much as to look somewhat like the blades of an anchor, when it is manifest he intended, so far as it is possible to judge, to vote honestly, and to leave or make no mark by which, contrary to the provisions of the statute, he could be identified.

Under the first class the petitioner is entitled to have six of the ballots added to his poll, which would overbalance the majority of the respondent and give the petitioner the majority of three in his favor. Under the sixth class, if the three votes under that class be added

to each of the parties, it will leave their relative numbers the same. And in my opinion they must either all be added or all rejected. But I think they must be added to the poll of each of the parties—three to each of them. That disposes of twelve of the ballots.

If I join classes two, three and five together, and treat them all as if they were ballots, crossed to the left of the name, that would give the petitioner five as against four, or an additional majority of one. It is not material to determine what should be done with these votes, because they do not affect the actual majority under my former ruling. If I were obliged to express an opinion one way or other, I should be disposed to count these votes, although they were not put on the right hand of the candidate's name, but to the left of it. For I am of opinion the Act is not to be read as a declaration that if the cross be not put to the right of the name the ballot should be void. A marking to the left instead of the right of the name is not a cause for which the deputy returning officer is authorized to reject the ballots under sec. 55. The instructions to the voter are that he shall mark the cross with a pencil, but it has been decided that marking it with ink is a good vote. These instructions, too, do not require the voter to put the mark on the right of the candidate's name, as the instructions in the English Act do, but merely to put it opposite the name of the candidate. There are many cases in which a strict compliance with the statute, or its literal observance, has not been required. In the *Athlone case* the crosses to the left were not decided upon. In the *Wigtown case* the majority of the Court thought they were bad.

The fourth class, consisting only of each a single straight line, I do not allow, because there is a fair ground of argument that the elector not having completed his cross did not mean to complete it, and purposely left his will undetermined. In the *Wigtown case* the single lines were not allowed. If they were allowed here, there would be added five to the petitioner's ma-

jority; but so long as the majority exists without that kind of ballot, it is of no great consequence.

The seventh class is one I have had some difficulty in dealing with. No. 28, in which the voter, besides putting the cross for the respondent, has written the respondent's name in full, is certainly bad; for by that writing the voter may be identified, and it is for that cause that the eighth class has been disallowed. That will leave still three ballots of the seventh class, one of which, No. 4, is for the petitioner, and Nos. 32 and 33 are for the respondent. As a matter of fact, I do not think the marks in addition to the cross which are on these papers were put there by the voter in order that he might be identified. But I cannot say it may not have been for such a purpose. The marks in addition to the cross should not have been there. I feel it safer to reject all three. If they were added to the poll it would still leave the petitioner a majority of two. So long, therefore, as that majority stands it is not of any serious consequence what is done with these three votes.

Classes 8, 9, and 10 are rejected for reasons which are sufficiently apparent.

The result of the consideration of this first question is that the majority of votes on the poll is in favor of the petitioner.

As to the second question, the petitioner contended he was entitled to add to his poll the votes of eighteen persons, whose names were stated in a list put in at the trial, because their names were on the last revised assessment roll for the municipality in which they respectively resided—that is, upon the original or proper voters' lists—but were omitted from the copies of the lists which were made for the purpose of this election; and they tendered their votes, which were refused by the deputy returning officers, who also refused to furnish such voters with ballots because their names were not upon the copy of the list which was furnished to them for the purpose of taking the poll. The respondent admitted that thirteen

of the eighteen voters were persons whose names were on the original roll, and were entitled to vote at that election; and as to other two of them, he left them to be judged of by the evidence. The evidence shows that they were also entitled to vote. I think the whole eighteen were entitled to vote at the election. Eight of them said to the deputy returning officer they desired to vote for the petitioner, and they tendered their votes for him. Four others made affidavits of their right to vote, and that they wished to vote for the petitioner; and they gave their affidavits to the deputy returning officer at the poll. The other six tendered their votes, but they did not say for whom they offered them. The respondent alleges that two other persons than those named by the petitioner were entitled to vote, and tendered their votes, but that their votes were rejected because their names were not on the copy of the roll; and that they would have voted for him. The petitioner admits these two persons were entitled to vote. The petitioner alleged that all those he had named would, if they had been allowed to vote, have voted for him. And the respondent alleges that the two he has named would, if they had been allowed to vote, have voted for him. The petitioner claims he is entitled to have, under any circumstances, the eight votes of these persons—who had votes, and who tendered them to the deputy returning officer at the poll, and who tendered them for him, the petitioner—added to his poll. And that he is also entitled to have the votes of those four persons who made affidavits, and gave their affidavits to the deputy returning officers, because they tendered their votes, and they say in the affidavits they intended to vote for the petitioner. The petitioner contends also that in strictness he is entitled to claim the remaining six votes as well, because he has shown by evidence given at the trial that they declared at the poll that they then intended to vote for him, although not to the returning officer. The petitioner at the same time admits that these eighteen names are not any of them of

consequence to him, so long as he has a majority independently of them; and so long as the two omitted names for the respondent are not added to his poll.

The respondent asserts that none of these eighteen votes claimed by the petitioner can be added to the poll, because the new provision as to voting has altered the whole of the former procedure. That the present purpose of the statute is to secure secrecy of voting, to carry into effect the general scheme of legislation on the subject. The law provides that only one elector at a time is to be introduced into the compartment where he fills up his voting paper. He is then to put it into the envelope supplied to him for that purpose, and close it and give it to the deputy returning officer. He is not allowed to take his ballot paper out of the polling station, and all officers, clerks, and agents at the polling place are to maintain secrecy as to the voting in a great many particulars, the observance of which is secured by the penalty of fine or imprisonment; and besides that, no voter shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. And it was argued that there is no other method whatsoever of giving a vote or declaring an intention to vote than by means of the ballot paper. That a verbal statement by the elector to the deputy returning officer of the person for whom he wished to vote was of no avail, for that is not now the mode of voting. And it is said that a voter may alter his mind up to the last moment of his completing the ballot paper; and therefore the most formal tender of his vote in any other manner than by a ballot paper is altogether void. For these reasons the respondent contended no votes could now be added to the poll of either party which were not in the form of ballot papers. However grievous the wrong may be which was done to the elector or to the candidate, it was argued that there was no such remedy as the one now claimed by the petitioner, and if there is a remedy it must be the one which the petitioner has himself set out in his petition as the alternative if he

fail in getting relief in any other way, viz., by avoiding the election altogether, in order that there may be another and a better poll taken. And that in case the majority is against him, the petitioner cannot claim the seat so long as these votes so wrongly excluded from the poll, no matter for whom, or how, they were intended to have been given, are numerous enough, as they certainly are, to influence the result of the election.

The petitioner asserts that there must still be, as there was heretofore, a method of getting the benefit of the votes which were plainly tendered for or can be shown by evidence to have been intended for him. But that under any circumstances the respondent cannot make use of the petitioner's rejected votes, in his (the respondent's) favor, for the purpose of setting aside the election; and that the petitioner's rejected votes cannot influence the election in reality so long as he still keeps the majority by other votes.

By the English Reform Act, 2 & 3 William IV., cap. 45, sec. 59, persons omitted from the register by the revising barrister were permitted to tender their votes at the election, stating for whom they tendered their votes, and the returning officer had to enter in the poll book the votes so tendered, distinguishing them from the votes which he admitted in the ordinary course. There was no such clause in the Irish Act, yet it was decided that where the revising barrister had rejected a name, the person might tender his vote at the poll, and the committee, notwithstanding the want of such a clause in the statute, might afterwards add it if it were one which was properly receivable; *Coleraine case* (P. & K. 503). It is said that a select committee would add the name of a person to the poll in favor of the candidate for whom he tendered his vote at the election, although the statute made no provision in favor of such a person who had been left off the register, and that such power was exercised under the original common law authority of the House of Commons. Warren's Election Law (1857),

359, referring to *Dawson's case, Southampton* (P. & K. 226), *Gaunt's case, Droitwich* (K. & O. 57), *George's case, New Windsor* (K. & O. 163), *Seller's case, Lyme Regis* (B. & Aust. 499). In the *Warrington case* (1 O'M. & H. 42-46), Mr. Price, for the petitioner, handed in a list of the persons whose names he claimed should be added to the poll. Martin, B., asked if there was any precedent for adding votes to the poll, when voters had done their utmost to record their votes, and by the mistake of the poll clerk their names were omitted. Mr. Price answered, "I can find no precedent for that." Martin, B. (to Mr. Quain), "I believe you do not dispute that if a vote has been duly tendered it may be added to the poll." Mr. Quain, "Not if in your Lordship's opinion it has been duly tendered." Martin, B., "That is a mere matter of fact for me." As to what should be done to constitute a tender of the vote, the elector must state, at the time he desires to vote, the candidate's name for whom he offers to vote: *Gloucestershire case* (2 Peck. 155). Where it was disputed whether the voters actually named the candidate at the time, the committee held the tender of the votes good because the poll clerk said he had no doubt they offered themselves on behalf of the petitioner, and the circumstances under which the voters appeared before the returning officer may amount to a tender independent of any positive declaration: *Harwich case* (1 Peck. 396). So although the voter was not asked nor said for whom he voted, yet it appearing under circumstances before the returning officer that it could not be mistaken for whom he meant to vote, his vote will be added to the poll (2 Peck. 167 n.) The tender of a vote must be to the proper officer: *Warrington case* (1 O'M. & H. 45, 46). In none of these cases was the tender of vote made under the system of voting by ballot.

In all of the cases now before me on this trial for adjudication, the deputy returning officer refused to give the persons in question ballot papers to vote upon. By the statute no person is entitled to know the candidate

for whom any voter at such polling place is about to vote, or had voted: sec. 72, subsec. 2. Nor shall any person communicate at any time to any person any information obtained at a polling place as to the candidate for whom any voter at such polling place is about to vote, or has voted: subsec. 3.

If the elector must first tender his vote for a candidate to the deputy returning officer before he can properly claim a ballot paper, in a case such as those under consideration, that is, where the elector's name is on the original roll, but not on the copy, and where but for that defect he would be unquestionably a good voter to the knowledge of the deputy returning officer, then the rule of secrecy is broken, and the officer becomes aware of the candidate the elector is about to vote for. If the deputy returning officer can demand or must have made to him a good tender, as under the old law, by having the name of the candidate for whom the elector is about to vote declared to him before he can be called upon to furnish the ballot paper, he may apply that rule in every case to persons whose names are on the copy of the list, and entitled to vote, as well as to those whose names are not on the copy, but who are entitled to vote. And yet, unless such a tender of the vote for a particular candidate be then made to the officer, how can a vote for any particular candidate be afterwards entered for him? Assuming there is the power to do so, there is a difficulty certainly in the way. Subsec. 3, above referred to, shows, however, that knowledge of the way the elector intends to vote may come to the officer in some way or other, for he is forbidden to communicate that information to any person. Here, as a fact, there are eight persons who told the officer for whom they desired to vote—that is, for the petitioner; and he got four affidavits from other electors stating for whom they proposed to vote; and there is reason to believe that in the other cases mentioned by Leary, the agent of the petitioner at Eldon Station, No. 4, the votes that the returning officer

there rejected he knew were for the petitioner, because Leary was the petitioner's agent there, and he pressed the deputy returning officer to take the votes and keep the ballots separate from the others. So that if any are added to the petitioner, all of them should be added according to the rule and practice before referred to in such cases.

The principal question, however, is, can any of them be added under the present law. It is plain, if it cannot be done, that the election is in effect placed absolutely and irrevocably, while the law remains as it is, in the power of an unscrupulous deputy returning officer. It rests with him to seat whom he likes, and exclude from Parliament whom he likes, and to disfranchise also whom he likes. A pecuniary recovery had against him for his misconduct is no recompense. The result of the election is not to be nullified if the result can be plainly and satisfactorily made out by such an examination as a committee of the House could always, by its common law powers, apply to the case.

I have referred to the exercise of these common law powers in cases which had not been provided for, and I have referred to a case at law where the election Judge added on votes and disposed of others according as he thought they had been regularly tendered or not, although the statute under which he acted made no mention of any such power. The same course was pursued in this country before the voting by ballot was introduced. The Judge may, under the 73rd and 94th sections, strike votes off in cases of bribery, treating, or undue influence.

The deputy returning officer may reject ballot papers in five cases: sec. 55—(1.) When they are not similar to those supplied by him, (2) or are contained in any envelope different from that supplied by him. (3.) All those by which votes have been given for more candidates than are to be elected. (4.) All those contained in the same envelope when such envelope contains more than one. (5.) And all those upon which there is any writing or mark by which the voter can be identified. He can

reject them, perhaps, in some other cases, although they are not specified; but, whether he can or not, are illegal votes to stand when it is plainly proved they have been given? If a woman, or a minor, or an alien vote, who are all incompetent—are their votes to stand? If there be plain rank personation, both of the living and the dead; or there be no such property as that voted upon; or if the Judges who are disqualified from voting do vote—are these votes to stand? Is there no redress but a new election, where the same thing may happen again? If these votes can be struck off, what is there to prevent proper votes from being added on?

Nothing that I see but the manner of giving the vote now being by a ballot paper in place of its being *viva voce* as formerly; and the purpose of the new Act being to secure secrecy on grounds of public policy, whereas the voting was openly given before. The manner of voting by a paper should not, if it be possible to avoid it, be held in any manner to lead to a disfranchisement because the deputy returning officer has wantonly or ignorantly refused to deliver ballots to those who are entitled to have them and to use them. To say that the vote cannot be allowed—either by the House of Commons, or by the Courts or Judges acting for and representing the House of Commons—because it has not been given by ballot paper, and that the deputy returning officer can wilfully, vexatiously or ignorantly refuse to furnish the ballots, is not only to make him master of the election, but is to make the wrongful act on his part, the justification for not being able to remedy the mischief and injury he has caused. The whole power and policy of the law, and the rights and privileges of the House of Commons to control these elections, and to grant relief against mistakes or misconduct, cannot have been surrendered, nor the rights and interest of the candidates and the electors given up, because the House assented to have these controverted elections tried by a different tribunal than that of their own committee; or, as it is expressed, because

they thought it was "'expedient' to make better provision for the trial of election petitions, and the decision of matters connected with controverted elections of members of the House of Commons of Canada." The Court is to exercise the like "power, jurisdiction and authority with reference to an election petition, and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction." The English Act, 31 & 32 Vict., c. 125, passed in July, 1868, was one under which the *Warrington case* was tried before Martin, B., and from which our first Controverted Election Act was taken, and there is no greater power given by it than was given by our Act of 1873 to the Judge to add on votes, and yet it was done in that case, and the right to do so was not disputed.

The only change in the law since then is that the voting is by ballot. But for the reason before given, I do not look upon th[illegible]s an invincible reason against the exercise of the power of adding on or rejecting votes, if the fact of how the vote was then tendered can, notwithstanding the difficulties in the way of acquiring such information, be made as apparent to the Judge under the new system as it could have been under the former system. Here, from the express declaration to, or in the hearing of, the deputy returning officer by some of the electors, by naming the candidate for whom they desired to be allowed to vote, and claiming to have the right to vote for the particular candidate they wished to vote for, and for whom they tendered their votes, is placed beyond a doubt; and there is sufficient evidence, in my mind, to lead to the conclusion that in most if not in all of the other cases in question, the deputy returning officer knew distinctly, from the circumstances accompanying the claim to vote, as by the affidavits given to him and the particular agent who was pressing the reception of the votes, that such person intended and desired to vote for a particular candidate, although the name of the candidate was not mentioned at the time.

If it became necessary, to settle this election, that I should determine the claim made to add on these votes—or such of them as may be held to have been duly tendered for a particular candidate under the former law—I should have been obliged to have decided the matter one way or the other, and I should have determined it in that manner which is most consistent with the old law, and in that manner which would have saved the disfranchisement of electors, and which would have spared the necessity of a new election, merely to discover the sense of the riding as to which of the candidates had the majority, when that fact was made quite apparent to me by the evidence which I had already before me; and I should have reported the matter fully to the House of Commons, with my reasons for so acting and deciding. It would have been my duty to try the election petition and any matter put in issue by it. There is the power to add on or strike off votes given by ballot, although the Act does not in terms say so. I am doing so in this very case according to the ballots, and I think I have the power to deal with votes which were duly tendered, as under the old law, when a ballot was duly requested by the voter, and was wrongly refused by the officer. It is true secrecy is not preserved in such a case. But if it is necessary to preserve the right of voting, and if that can be done only by divulging, from necessity, for whom the elector intended to vote, I should say the necessity justified the declaration he was forced to make, and there is nothing in the Act which prevents an elector from saying, if he choose to say, for whom he intends to vote. It is true the only mode of voting is by ballot, and that the elector may change his mind up to the moment of putting his cross on the paper. But I am dealing with cases in which the electors have been refused the ballot papers and have had their votes rejected. And if the question is at last reduced to this, whether any person can be said to have had a right to vote to whom the deputy returning officer has refused to give a ballot paper, I have no

hesitation in answering that in the affirmative. Were it otherwise there would be an end of election by the people, and it would follow that because the officer had wrongfully refused to give a ballot paper to a good voter, the voter had not a vote in fact or in law.

It is true the election may be avoided if these rejected votes would have affected the result of the election; but that is no proper remedy to the voter, and a new election is a serious matter, and is surely not to be resorted to but in the last extremity, and only if no other adequate remedy can be found, and it must be borne in mind that the new election does not determine who should have been returned at the former election, for there may be a different voters' list, death and other circumstances may have changed the constituency, and the opinions of the electors may have since been altered. But in my opinion here is another and a better remedy. I have expressed my opinion on it at large because it is an important matter, although in my opinion I am not obliged to act upon the votes which were so rejected, and I do not act upon them. These votes would add to the petitioner's majority. But the majority he has without these votes is sufficient for the purposes of this election: unless that result can be impeached upon the charge of bribery and treating, which has been made against him, and if it can be sustained, then it is still of no consequence whether the votes last referred to be added to the first named majority of three or not, because a greater number of votes than all the classes in the petitioner's favor combined will have to be struck from his poll.

This brings me to the next question—the one as to the alleged agency of William Peters. So much stress and reliance have been placed upon this part of the case that I shall be obliged to state precisely what the evidence was, which it is said constitutes the bribery and treating by Peters, and the alleged agency of Peters for the petitioner. I shall first of all state what, according to my opinion from the decided cases, it is required as necessary to establish the fact of agency by any person on behalf of a candidate.

In the *Hereford case* (21 L. T. N. S. 119), Blackburn, J., said: "In the common law a man is not responsible for the act of his agent except when it is done directly according to an authority which is given to him. In parliamentary law it is otherwise. A candidate who has really meant that his agent should not commit a corrupt act is nevertheless responsible to the extent of losing his seat if the agent does commit a corrupt act. And for that difference in the law, established by parliamentary committees formerly, and now recognized by statute, it seems to me there are two principal motives, I will not say they are the only ones, but they are two principal motives. It would not be possible to unseat a person for corrupt practices, if he were permitted, by the means of persons who acted for him or who brought him forward, either one or the other, to obtain the benefit of their aid, if he were not to be also responsible to the extent of losing his seat for the corrupt practices that were done by them for his benefit. That is one of the great reasons for which, as a matter of public policy, it was thought necessary, in order that it might check corrupt practices, to establish that principle. Another, and a very considerable reason no doubt, was that in all elections where extensive corrupt practices, bribery and the like prevailed, great care was always taken that the candidate should be ignorant about it. . . . And from the loose morality which formerly did prevail at elections, and which I do not say is completely got rid of, candidates did think themselves bound in honor to pay, and did pay. . . . And the question very much was, was that agent, when doing the thing, in such a position that there would be that claim on the candidate, according to the false morality of parliamentary election matters, to recoup him for what he had done? Now those are two reasons for the parliamentary law differing from the common law. They were not the only ones, but they do give two very good guides and assistances. And I apprehend that in a case where corrupt practices are shown, which the candidates themselves

are not cognizant of, you must bear these two principal reasons in mind, and then, exercising what may be called common sense, you must see—does the particular corrupt act come within the rule as an act done by an agent? If it does not, then, though the person may have been canvassing the town, or speaking on one side or the other, still we could not say that the candidate should be unseated on that account. Every bit of canvassing and acting for a candidate is evidence to show agency; but the result cannot depend on any precise rule that I could define."

The acts in question in the case just referred to were that one Harrison, who had a number of workmen in his employment, gave a breakfast to them on the morning of the poll; he expected about 40, but about 70 came he told the men that they could bring their friends with them. He ordered a break and three omnibuses on the polling day and drove some to the poll, remaining on the box while they went into the polling booth. He was a Liberal. There were several Conservative voters among his guests. He swore the breakfast was not given to influence the voters. He was not on the Liberal committee. He attended the committee room once or twice to make inquiries. He received a book from the clerk of the Liberal committee containing the names of his men who were voters. He accompanied Mr. Bosley (an acknowledged agent of the candidate) once or twice when he was canvassing. He received letters from the Liberal candidate thanking him for the services he had rendered at the election. He said he acted only as a volunteer. He took three sets of voters to the poll, and afterwards drove them to his house. His house was clear by one o'clock. Bodenham, an agent of the candidate, asked Harrison to canvass two named voters, which he did. The invitation to breakfast was to everybody, and to everybody's friends; it was to the whole town, and everybody that liked to come was to come. Edwards, the committee clerk, invited people there and brought

them up. So did Williams, Rowlands, Lloyd, and probably others who were committee men did the like. The Judge then said, "I do not say that any one of these things would satisfy me that Harrison was an agent. Taking simply the fact that he gave this breakfast, or merely that he had gone with Mr. Bosley to canvass, I do not say that that would satisfy me, though it goes strongly to prove it; nor would the fact that Bosley had spoken of him afterwards as having done such good service; nor yet do I say that the fact that Williams, a committee man, brought people to the breakfast would satisfy me; nor yet that Edwards, who had been employed about those railway men to some extent, brought people up to breakfast; nor yet that Lloyd was there; nor yet that Davis was there. No one of these things, by itself, satisfies me that Harrison's breakfast was one for which the party are to be considered responsible; yet, taking them altogether, a number of little pieces of evidence do produce an effect on my mind which leads me to say that, according to the usual rules in parliamentary matters, this, which is certainly an act of corruption, is so closely brought home to the agents and persons in authority as to constitute them accessories to it, and for which the candidates ought to be responsible. I cannot come to any other conclusion than that this act is one which avoids the election."

There is one other case to which I shall refer for the language of the Judge—the *Taunton case* (30 L. T. N. S. 125). Grove, J., said: "I am of opinion that to establish agency for which the candidate would be responsible, he must be proved to have by himself, or by his authorized agent, employed the persons whose conduct is impugned to act in his behalf, or have to some extent put himself in their hands, or to have made common cause with them —all these, or either of these—for the purpose of promoting his election. Mere non-interference with parties who, feeling an interest in the success of the candidate, may act in support of his candidature, is not sufficient in my

judgment to saddle the candidate with any unlawful acts of which the tribunal is satisfied he or his authorized agent is ignorant."

In the *Westbury case* (20 L. T. N. S. 24), Willes, J., said: "If I find a person's name on a committee from the beginning, that he attended meetings of it, that he also canvassed, that his canvass was recognized, I must require considerable argument to satisfy me that he was not an agent within the meaning of the Act." In the same case (1 O'M. & H. 48) it is also said, that authority to canvass certain workmen would not be an authority to canvass beyond those workmen. With respect to anything done as to voters other than those workmen, it might very well be said that was no agency, but within the scope of the authority to act as agent there was quite as strong a responsibility, on the part of the candidate, as there would be in the case of a general authority to canvass.

In the *Penryn case* (C. & D. 61) one Sewell, on the authority of resolutions passed at a meeting in the borough, went to London and brought down the sitting member as a candidate. The two attended a meeting together, going there in company. Sewell was appointed chairman by the company present. It was a meeting of the sitting member's friends. Sewell accompanied the member generally on his canvass, and he attended on the hustings. During the poll Sewell introduced a voter, saying he, Sewell, had brought him down as a candidate, and Sewell was not called on to contradict these facts. *Held*, that agency was established.

Speaking prominently on the hustings in support of a candidate, and canvassing on his behalf, coupled with offers of money, constitute a man an agent to the extent of proving corrupt practices: *Lancaster case* (14 L. T. N. S. 276).

The parliamentary practice of holding candidates civilly responsible for the acts of their agents, although the agents have exceeded the limits of their power, rests on a better and more satisfactory basis than is commonly

ascribed to it. It is this: It is a well known rule of law and of equity that a person cannot take the advantage of an act procured by and founded on the fraud of another, although it is committed by that other as his agent, without his knowledge, without being liable to lose that which he has gained by such means, or to be in some other respects liable for the fraud: *Barwick* v. *English Joint Stock Bank* (L. R. 2 Ex. 259); *Udell* v. *Atherton* (7 H. & N. 172, as explained in L. R. 2 Ex. 265); *New Brunswick R. R. Co.* v. *Connybeare* (9 H. L. 711). It would be manifestly unjust to the public that a candidate should secure his election by the corruption, or other improper means of his agent; and while taking the benefit of the acts done, repudiate the exercise of those powers which the other as his general agent had used for his benefit, and in his business and interest, although the agent was not authorized to do these specific acts. The public can have no relief in such a case, and it is the public which is most concerned, but by the invalidation of everything which has been wrongfully accomplished by such means.

The agency which I must determine to exist or not is this: Did the candidate authorize the person whose conduct is impugned to act in his behalf? Or, did the candidate to some extent put himself in the other's hands, or make common cause with him in the election, and for the purpose of promoting it? And the means by which I must determine it are the evidence which was given before me, tested by the rules and instances so copiously given in the different election reports, and sufficiently referred to in the cases which I have before mentioned.

The person said to have been the petitioner's agent is William Peters. It is better I should consider and dispose of this part of the case before determining whether the act charged against Peters was an act done corruptly or not, because that matter would possibly require more consideration than the one of agency; and if it should appear there was no agency, it will become unnecessary to consider the nature of the act done by Peters in any way. As to

the alleged agency, Peters said in effect, that he was an innkeeper on the Victoria Road, and kept the inn there before and at the time of the last election. There was a meeting at Ashby's house, in the township of Carden, before the election. It was Cameron's meeting. Witness thinks he was chairman of the meeting. He took Cameron's side at the election and at the meeting. He opened the meeting. He said Cameron was there canvassing for the election. Did not know who moved he should be chairman. He put up some notices in his house of that meeting, and he sent some by Ashby or by some of the neighbors. The notices were sent to witness to be distributed. Cameron was up at witness' inn several times when he was in that part. Cameron came from Ashby's meeting in witness' cutter, and put up at witness' inn that night. There was no understanding that witness should be at the meeting. He was at the place of polling on election day. He never asked a man that day to vote on one side or the other. The following is in his own words: "Two or three days before the election I asked Ashby if he was going to get up dinners for the voters. He said he was not. He had done it before, and people did not pay him, and he was a poor man, and he could not do it for nothing. I told him he had better get up the dinners on account of the voters having to come so far to vote, and no place for them to get dinner. He said he could not unless some one would guarantee to pay for it; that at a former time he had given dinner to about eighty, and some one went round with a hat and gathered up $4.50, and that was all he got. I told him if he would get up the dinners I would guaranteee and see him paid for forty dinners. I asked what he would charge apiece, and he said twenty-five cents. I said I would give him twenty cents apiece; it was enough, as I had to pay it out of my own pocket. He would not agree to it for less than twenty-five cents. I told him to get up the dinners. I paid for the forty dinners. . . . . I spoke to Cameron about making such an arrangement before speaking to Ashby.

He said he could not do it unless Maclennan and he agreed to do it; that he durst not do it; we could not interfere in it; that the law would not allow it. I said the law must be very strict if it would not allow a man to get his dinner. I asked him if it would hurt the election if I paid for the dinners out of my own pocket. He said he did not know; he said he could not do anything about it unless with Maclennan's consent. I don't recollect if I told him I would give the dinners. Cameron and I did not speak of the way it was to be done. He did not seem to approve of it, in case it should interfere with his election. . . . I made an arrangement with Ashby that I was to pay for forty of Mr. Cameron's voters. . . . I took no steps to get my money back. I took three bottles of whiskey that day from my place to Ashby's—other people did so too. I left the whiskey in care of Mr. Malally, the father of Mrs. Connors, at Mr. S. Connors' house. I think I gave a treat as well to some of Maclennan's friends as to Cameron's. I refused to give James Sample his bitters because he had not voted. I said to go and vote; I would not treat him till after that, in case it should be said I had bribed him. He did not get his bitters." In cross-examination he said: "I do not recollect I ever canvassed any voter; there was no tavern nearer Ashby's than my place, a distance of five miles. I heard the people say they had to come twenty or twenty-five miles to vote there. Cameron had his own team at Ashby's the night of the meeting. I asked him to ride with me, and he did so; it was by chance he rode with me. Cameron told me a candidate could not provide dinners for voters for the purpose of influencing their votes directly or indirectly; that there was no way of his getting round it only with Maclennan's consent. I never applied to Mr. Cameron for payment of the $10, and never expected it. I never got from him any money but the ordinary tavern bills while he stopped at my house. I did not know if the persons I gave some of the tickets for dinner to had votes or not; or whether they were for

Maclennan or not. I kept cautious as I was giving dinner not to ask any man for his vote, in case Maclennan got a claw on me. I was not a voter."

The petitioner was examined on his own behalf. He said it was while driving with Peters from Ashby's meeting that Peters first spoke to him of the dinners. Peters said some arrangement should be made for dinners for those who came a long way to vote. "He asked me if I could make any such arrangement. I said I could not, directly or indirectly; the law was very strict, and I would not jeopardise the election by anything of the kind. I was sorry for the people, and I would see Maclennan and speak to him, and we might come to some arrangement about it. When I saw Maclennan it escaped my memory. Some days after that Peters spoke to me again of the dinners. I said I had forgotten to speak of it to Maclennan, that I could make no arrangement, or be a party to it in any way. He asked me if there was any harm in his paying for the dinners out of his own pocket, if he chose to do so. I said I could not prevent him if he chose to do it; but I did not want him to do it, as exceptions might be taken to it; that if done by an agent it was the same as if done by myself; and although he was not my agent, I would rather he would not do it. I never spoke to Ashby on the subject nor he to me. I did not hear or know of Peters giving dinners on that day, and I was at the poll there from about two p.m. till after the poll closed. I was in the polling room nearly all the time."

That is all the evidence material on this part of the case. Is there upon this statement any evidence of the petitioner having appointed Peters his agent, or of his allowing or authorizing him to act on his behalf? Is there any evidence that the petitioner to some extent put himself in the hands of Peters for the purpose of the election? I think I must say that a perusal of the evidence shows there is not a particle of evidence to sustain the assertion that Peters was the agent of the petitioner.

The fact of presiding by chance, as it were, at the petitioner's meeting at Ashby's, at which the petitioner was present, and at which Peters was present just as any one of the neighbors in that part upon both sides was present, and of his opening the meeting by speaking a few words in favor of the petitioner, are circumstances not to be wholly disregarded in trying the question of agency or no agency, but they are utterly insufficient of themselves to show that the petitioner had thereby to any extent put himself in the hands of such a person to represent him as a general agent. So also the receiving of some bills by Peters, and his putting some of them up for the intended meeting and some of them up in his own house, and forwarding others for distribution, are of no weight whatever alone to show anything like agency on his part. It was not shown the petitioner knew of the bills being so sent to and in turn sent off by Peters, and if he had known it such acts would have had force only by what they could add to other matters, but they would have been of no significance whatever of themselves. Nor do they, with the addition of the fact of the chairmanship and of the short address of Peters, amount to anything requiring any serious consideration. They do not show that the petitioner put himself in Peters' hands, or suffered Peters to act for and represent him.

If an agency could be made out of these materials, it would, under the law, already severe enough in that respect, be quite intolerable. It would exclude the commonest acts of kindness and hospitality between neighbors. It would ostracize the candidate by keeping him estranged from the electors, who should have every opportunity of becoming acquainted with him. It would prevent association at a time when combination was especially useful, and it would well-nigh stop social intercourse altogether. I entertain no doubt that the acts to which I have alluded are not, and cannot be deemed sufficient to establish agency for any purpose or to any extent, and thinking so, it is right I should plainly say so.

Then, did the conversation between the two as to the dinner constitute Peters the agent of the petitioner? It was not contended by the respondent that the first conversation was sufficient to establish the character of agent or agency. No doubt it did not do so, but repelled it altogether. The second conversation, it was contended, did, of course in connection with all the other circumstances, and by the force and effect of their addition and accumulation, create Peters the agent of the petitioner for the purpose of providing for the dinners which were given and paid for by him. It is so contended, because the petitioner said among other things, when he was asked by Peters if there was any harm in Peters paying for the dinner out of his own pocket if he chose to do so, and he, the petitioner, answered that he could not prevent him if he chose to do it, but he did not want him to do it, and he would rather Peters would not do it; and it was argued by the respondent that the petitioner was bound to have given a positive denial to Peters. That the petitioner should have told him he must not do it, or that he should not have used such language as that he, the petitioner, could not allow him to do it, and that he, the petitioner, could not prevent him and did not want him to do it, and he would rather it was not done. But can it be said if such language even as that is used, and the speaker really means what he said, and is not covertly affording an approval of the act he is assuming and pretending to condemn—and I have not the least reason for thinking the petitioner did not really mean what he said—that agency has been established, that the petitioner had put himself into the hands of Peters for that purpose? The language of Mr. Justice Grove, already quoted, is: "Mere non-interference with parties who, feeling an interest in the success of the candidate, may act in support of his candidature, is not sufficient in my judgment to saddle the candidate with any unlawful acts of which the tribunal is satisfied he or his authorized agent is ignorant." But the petitioner said more, far more, than the respondent

has, on his argument addressed to me, assumed he did say. The petitioner plainly disclaimed having anything of the kind done, or recognising it if it were done. In my opinion the petitioner repudiated all connection with the business of the dinners, and Peters perfectly understood he did so, and that he was doing so.

While the numerical majority is on the side of the petitioner, I must consider him to be the person who is rightfully entitled to the seat until that right is displaced, and I must look upon the charge which is made against him as if it were in effect made against the sitting member. In the language of Martin, B., in the *Warrington case* (1 O'M. & H. 44), "I adhere to what Mr. Justice Willes said at Lichfield, that a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside." I refer also to what was said by the same Judge in the *Wigan case* (1 O'M. & H. 192): "If I am satisfied that the candidates honestly intended to comply with the law, and meant to obey it, and that they themselves did not act contrary to the law, and *bona fide* intended that no person employed in the election should do any act contrary to the law, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction."

I apply the same language to this case, and I add that I will not unseat the sitting member or prevent the person who has the numerical majority from having the seat upon the supposed act of an agent unless the agency is established to my entire satisfaction, and in this case that has not been done; on the contrary, the fact of agency has been disproved, disclaimed, and repudiated in the most explicit and emphatic manner; and it is well that it is so, for it is the only act that has been mentioned as having been done throughout this election of the nature attributed to it; and no doubt, if there had been any acts of a more serious or even of the like nature, they would not have lain concealed, considering the strong personal interests

which enter into contests in this constituency, where the majorities in several of the late elections have been only three or four for the successful candidate.

I must say this election contrasts most favorably, for all parties, with some of those which have been held in other places, and which have not been creditable to the parties concerned, and which must sorely have tried the faith of those who believe in the excellency of popular representation, when they find those who were supposed to be the honest and actual choice of those who were supposed to be the free and independent electors of a constituency holding their seats by the mere force of money or undue influence; not by an election, but by a contract of sale and purchase which was as bad on the side of the purchased as on that of the purchasers. From all that, and anything approaching it in any respect, this election and the candidates stand unquestionably free.

I have already said that if the charge of agency were not maintained, and in my opinion it has not, it would be unnecessary to consider whether the giving of dinners by Peters was or was not bribery, or treating within the meaning of the Act. The point was argued before me very fully by the respective parties, and many cases were cited as applicable to it. I am not sure what opinion I should have formed with respect to it. It is not improbable, if the agency had been established, that although the electors had come from ten to twenty-five miles to the poll, and there was no inn nearer than five miles to it, I should have held it to have been a violation of the statute. I must, of course, have been satisfied that it was corruptly done; that is, done for the purpose of influencing the election either by voting or not voting, before I could have found the offence to have been committed; and it is not so perfectly plain that a free dinner, given by a candidate to a hungry voter, who has travelled twenty miles in a Canadian winter day in January to the poll, is necessarily, and as a mere consequence, a corrupt act. I do not know any law which would prevent a candidate

from giving a voter in such a season, and on such an emergency, a bit of bread and cheese for himself, or a lock of hay and a drink of water for his horses. These are matters of degree: the manner in which, and the number perhaps to whom, these services were rendered, and the more or less need there was for the act, must all be considered. Such questions are difficult to deal with, because of the almost inevitable tendency they have to operate upon the voter, and the difficulty there is in discovering the true motive for the candidate's liberality at such a time, and the danger there is in permitting any such thing to be done when the gain is so immediate and it is so very likely to be the leading cause for so much activity and kindness. It is sufficient to say that I have not made up my mind on that part of the case, and I am glad it is not necessary I should do so. My leaning, however, at present is more against the rightfulness and lawfulness of that transaction than in support of it.

I have given this case a careful consideration, and determining this matter of agency as I do, I must decide that the petitioner having the majority of votes in his favor, upon an inspection of the ballot papers only, is the person who was duly elected for the North Riding of the County of Victoria, at the last election for the Dominion Parliament, held for the said North Riding, and that he should have been returned as the person so duly elected, and that the election and return of the respondent for the said riding at the time aforesaid were and are void.

I must award the general costs of the cause and proceedings to the petitioner to be paid by the respondent, with the exception of the costs relating to that part of the petition which applies to the voters whose names were not upon the copies of lists furnished to the deputy returning officers, but who were entitled to vote, and should have been admitted to vote at the said election, because I have not judicially determined that part of the petition, and with the exception of the cost of the scrutiny

of the ballots, because such rejected ballots were not the fault of either party, but of the deputy returning officers. The parties must each bear his own costs with respect to these last mentioned matters.*

The petitioner appealed to the Court of Queen's Bench, but the Court affirmed the judgment of Mr. Justice Wilson (37 Q. B. 234).

(10 *Commons Journal*, 1876, p. 24).

SOUTH RENFREW (2).

BEFORE MR. JUSTICE WILSON.

RENFREW, *21st September, 1875.*

WILLIAM MCKAY *et al.*, *Petitioners*, v. JOHN LORN MCDOUGALL, *Respondent.*

Defective Nomination Papers—Returning Officer—Costs.

The nomination paper of B., one of the candidates at the election complained of, was signed by twenty-five persons, and had the affidavit of the attesting witness duly sworn to as required by the statute. The election clerk found that one of the twenty-five persons was not entered on the voters' lists, and thereupon the returning officer and election clerk compared the names on the nomination paper with the certified voters' lists in his possession, and on finding that only twenty-four of the persons who had so signed were duly qualified electors, he rejected B's. nomination paper, and returned the respondent as member elect.

Held, 1. That as the policy of the law is to have no scrutiny, or as little as possible, in election cases, and to give the people a full voice in choosing their representatives, the defect in the nomination paper was one to which the returning officer should not have yielded.

2. That if the election had gone on the defect in the nomination paper would not, according to the 20th section of 37 Vic., c. 9, have affected the result of the election.

Semble, that the returning officer is both a ministerial and a judicial officer; and that he might decline to receive the nomination of persons disqualified by *status* or office, and also nomination papers signed by unqualified persons if he had good reasons for so doing.

The returning officer having acted honestly and fairly in rejecting the nomination paper, each party to the petition was left to bear his own costs.

The former election for this constituency having been declared void (*ante* p. 556), a new election was held on 24th October, 1874, at which Mr. William Bannerman and the respondent were candidates. The returning

* See the case as to the revision of costs, 39 Q. B. 147.

officer rejected Mr. Bannerman's nomination paper on the facts set out below, and returned the respondent as member elect. The petition was thereupon filed to set aside the election.

Mr. Cockburn, Q.C., for petitioner.
Mr. Bethune for respondent.

The evidence showed that on the day of nomination the nomination papers of William Bannerman and of the respondent were delivered to the returning officer. The election clerk, on examining them, found that Bannerman's nomination paper had twenty-five names thereon, but that one of the twenty-five was not on the voters' lists. The returning officer then took legal advice, and on comparing the names with the official copies of the voters' lists, found that William Tierney, one of Bannerman's nominators, was not qualified as a voter. Bannerman's nomination paper had been duly sworn to by one Muir according to the statute. Some negotiations then took place between the respective candidates and the returning officer to allow the nomination papers to be amended, although the hour for closing the nominations had passed, but the friends of the respondent would not consent, and thereupon the returning officer, acting under legal advice, rejected the defective nomination paper, and returned the respondent as member elect. The other facts appear in the judgment.

WILSON, J.—The petitioners complain of the rejection of Mr. Bannerman's nomination paper. It is not said that Tierney's name was then upon the list, nor is it contended so now; and it appears he was not on the assessment roll for 1873, in respect of real property, but it is said there were the names of twenty-five persons on the nomination paper as, and purporting to be, the names of actual *bona fide* electors of the South Riding, and twenty-four of them are so in fact, and the twenty-fifth was honestly believed to be so too. That it was a

genuine paper and not a sham document, and being so, although as a fact William Tierney was not an elector, yet the paper being duly sworn to according to the statute, the returning officer was bound to accept it, and to act upon it as a genuine truthful document. It is said that he and the election clerk raised and took an objection which was not apparent on the face of the document, and that they discovered it by an examination of the voters' lists, and that such a proceeding was in effect a judicial investigation and inquisition held without authority, and determined contrary to law. For the respondent, it is said that the returning officer is not wholly and only a ministerial officer; that he is necessarily, and in fact has certain judicial functions to perform; that he is by section 11 of the Act to decide on the number of polling places to be appointed; that he has to grant a poll by section 24 if more candidates than can be returned are nominated in the manner required by the Act; and he is by section 23 to report any nomination proposed or rejected for non-compliance with the requirements of the Act; and that in all cases when the objection to the candidate or voter or to the nomination paper is patent or notorious, he may act judicially; and that he cannot receive a nomination paper with only twenty-four names to it, for that would be the same as if he received it with less than the number of twenty-five electors in fact upon it.

I am of opinion the returning officer is both a ministerial and a judicial officer. He has not now, as formerly, to hold an inquisition into the capacity or qualification of a candidate or voter; but I feel assured if a person appeared and was nominated, and such candidate were a woman or a mere child, that the returning officer could decline to receive such a nomination, and in like manner he can decline to receive the nomination of a Chief Justice or the Speaker of the Senate. I think also he may refuse a nomination paper signed by less than twenty-five electors, because the Act requires that the nomination shall be by twenty-five. I am disposed to

think, too, he can reject a paper signed by twenty-five if it were declared by the candidate that the paper was a sham; that the names were those of persons who were not electors at all, and never had been; or that half the names were forgeries; and if there were good reasons for the returning officer to believe that statement, and he did believe it.

It is not every paper in the form of a nomination paper, however formally it may be prepared, that is to govern a returning officer, for that would be to make a farce of the whole proceeding, and to put parties to an unnecessary and vexatious expense, when it was known beforehand that it would be all to no purpose.

I feel a great difficulty in dealing with this case. The nomination paper was formally, on its face, correct. It was prepared and intended to be a correct document. It was honestly believed to be correct, and it was used fairly and truly for the purpose of an election, and it was a surprise to Mr. Bannerman and Mr. Muir, the attestant, to discover that William Tierney, one of the twenty-five, was not entered on the voters' list. I have no doubt the returning officer acted honestly and with perfect propriety in all respects according to the best of his judgment, and he acted on the legal advice which he sought for and followed in rejecting the paper. He had the means, to some extent, by him to verify the correctness of the persons' names in the paper being electors or not —assuming that *electors* mean those persons who were electors on the lists *to be used at that election.*

I think, however, with much hesitation, that the defect in this case, which I have no doubt exists, was one to which the returning officer should not have yielded, and it certainly was not accepted or yielded to by Mr. Bannerman, but was resisted by him, and the fact that the affidavit was wrong at all was denied by Mr. Muir. By reason of this one defect—one rather of form than of substance, for Tierney was in fact a real property holder who should have been on the list, and a defect not

appearing on the paper, but found by an examination of it with the voters' lists—the electors have been prevented from voting for and electing their own representative, when, in truth, if the election had gone on, this defect could not in any manner whatever, according to the 80th section, have affected the result of the election.

The policy of the law certainly is to have no scrutiny, or as little as possible, in such cases, and to give the people a full voice in choosing their own representatives. That has not been done here, and I must hold the election, according to the best opinion I can form, to be void. I acquit the returning officer in every respect from all blame, and I am of opinion he acted honestly and fairly to all parties; and if he erred, which, with some doubt, I think he did, he did so where many might equally have erred. He was anxious to have no difficulty raised, and his judgment was fortified by competent legal advice. I must leave each party to bear his own costs.

(10 *Commons Journal*, 1876, p. 32.)

NORTH RENFREW.

BEFORE MR. JUSTICE WILSON.

PEMBROKE, *30th June, 1st and 2nd July, 1875.*

BEFORE THE COURT OF QUEEN'S BENCH.

TORONTO, *2nd and 23rd December, 1875.*

PETER WHITE, *Petitioner*, v. WILLIAM MURRAY, *Respondent.*

Cumulative evidence—Offers and promises affirmed and denied—Costs.

A number of separate charges of corrupt practices against an agent of the respondent, based upon offers or promises, and not upon any act of such agent, each of which depended upon the oath of a witness to the offer or promise, but each one of which such agent directly contradicted, or gave a different color to the language, or a different turn to the expressions used, which quite altered the meaning of the conversations detailed, or constituted in effect a complete or substantial denial of the charges attempted to be proved against such agent

Held, 1. That although in acting on such conflicting testimony, where there was a separate opposing witness in each case to the testimony of the witness supporting the charge, the Election Judge might be obliged to hold each charge as answered and repelled by the counter evidence, he could not give the like effect to the testimony of the same witness in each of the cases where the only opposing witness is confronted by the adverse testimony of a number of witnesses, who, though they do not corroborate one another by speaking to the same matter, are contradicted in each case by the one witness.

2. That the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a single point, the more is confidence in such witness affected, until, by a number of contradicting witnesses, he may be disbelieved altogether.

3. That acting on the above, and on a consideration whether the story told by the witness in support of the charge is reasonable or probable in itself, the charges of corrupt practices against the agent of the respondent, set out in the judgment, were proved.

The petitioner was held entitled to the costs of the charges on which he succeeded, and the respondent to the costs of the charges on which the petitioner failed.

The election held on the 29th January, 1874, having been avoided (9 *Commons Journal*, 1875, p. 6), a new election was held under the Dominion Elections Act, 1874, at which the respondent was declared elected. A petition was then presented against the return, containing the usual charges of corrupt practices.

Mr. F. Osler and Mr. Thomas Deacon for petitioner.

Mr. Maclennan, Q.C., for respondent.

The evidences in support of the charges in the petition are set out in the judgment.

WILSON, J.—At the close of the evidence there was nothing shown to sustain either the personal charges or those alleged to have been committed by an agent with the knowledge of the respondent; and the case rested on the evidence given by the witnesses hereinafter named, and the counter statement of Thomas Murray, the brother and general agent of the respondent at the election in question.

The petitioner's counsel also relied upon the evidence given by other witnesses, not for the purpose of proving any substantive charge in respect of the matter relating to them, but for the purpose of giving effect to the charges relied upon as connected with the persons before mentioned, and as showing the general course of conduct pursued by the agent Thomas Murray throughout the election.

I shall take up the charges seriatim and dispose of them.

And here it may be proper to observe that they are all based upon offers or promises, not upon any act of or thing performed by Thomas Murray, the general agent of the respondent. And while admitting the general circumstances and much of the narative, and in the very words of each one of the witnesses in his account of the particular transactions which he relates, Thomas Murray gives a different color to the language and a different turn to the expressions which were used, which quite alter the meaning of the conversations detailed by the witnesses, and so constitute in effect a complete or substantial denial of the character of the charges attempted to be proved against him. He also, however, in many respects directly contradicts the witnesses.

If I were to act upon his opposing testimony in all nine cases in like manner as I might probably do if there were a separate opposing witness in each case to the testimony

of the witness who supports each charge for the petitioner, I might feel justified, and, all other things being equal, I might be obliged, to treat the case proved as answered and repelled by the counter evidence.

But I cannot give the like effect to the testimony of the same witness in each of the nine cases as I should, as a general rule, be required to give if there were a different witness in each case, when he, the only opposing witness, is confronted by the adverse testimony of nine persons, who, although they do not corroborate one another by speaking to the same matter, agree in this that they each and all of them contradict in material matters this one witness.

The contradiction by many persons, each speaking of a separate matter, of a single witness, who testifies as to the whole of these transactions, must naturally shake if not destroy the confidence which might be placed in that witness if he were opposed by the testimony of only one or two witnesses, speaking either of the same or of separate transactions.

The word of only one witness can hardly be held to counterbalance the testimony of many witnesses, and he be held to be alone right or truthful, and the cloud of witnesses who are against him be all deemed to be wrong, although each one of these opposing witnesses speaks only to an independent fact or circumstance not spoken to by any of the others.

If an action were brought to recover the amount of six promissory notes, and the defendant pleaded a denial of the making to the first note; that he was an accommodation party to the second; the plea of payment to the third; that he was discharged by the plaintiff as to the fourth; that there was a failure of consideration as to the fifth; and that there was fraud as to the sixth. And if his single testimony in maintenance of his respective defences were met by a single and different witness to each matter against it, it would be hard to say that the array of witnesses against him on these different

matters was entitled to no more consideration than if only one of such defences were on trial, and the plaintiff's sole witness was opposed by the defendant's sole testimony.

It is impossible to avoid seeing and feeling that the more frequently a witness is contradicted by others, although each opposing witness contradicts him on a separate point, the more is our confidence in that single witness affected, until at length, by the number of contradicting witnesses, we may be induced in effect to disbelieve him altogether.

It is difficult to believe that so many are wrong; it is easier to believe that one is wrong so many times; and the more there are who speak against him, the more we are led to believe that he is the one who is in the wrong. I stated this generally during and at the close of the argument of counsel on the trial, and I feel it right to state it again as governing me very much, perhaps I may say altogether, in deciding upon the evidence.

I do not say from this that when a witness has been contradicted by five or six credible witnesses on so many different points, that I must then believe anything which others, however extravagant or idle, may say against him.

I must, notwithstanding that state of things, first of all determine whether the story told by the witness in the first instance is reasonable or probable in itself, and if it be not, I should disregard the story, and so I should not be called upon to weigh what was said against it.

If as against six different witnesses speaking each to a single fact, I believed three of them against the one, and believed the one as against the other three, I should feel a difficulty in determining how far to treat the one as discredited by the first three, when his veracity had been strengthened by the belief accorded to him as against the second three.

The question of veracity does not depend only upon the strength of numbers, nor in some cases does it so at all.

Its true basis is character. It is upon the quality of the evidence, and the point is to determine that quality. And I should still have to consider the whole case both for and against the one witness before I could say whether I ought to believe him or disbelieve him as to the remaining three.

I submit these general observations at the outset, in order that I may apply them in such a manner as I shall have to deal with the evidence upon each charge as I take it up.

1. The first case is that which rests upon the transaction which took place with Alexander Bell. The facts stated were, that at a previous election, when Thomas Murray was a candidate, William Murray, the present respondent, employed one John Robinson to canvas Bell, and to hire him to work at $20 a month. Bell voted then for Thomas Murray, and after the election he went with his clothes to go to work for William Murray, who would not employ him, and he had to hire with some one else at $15 a month, and he lost, as he believed, the difference of $5 a month.

It appears that Thomas Murray did ask Bell to sign the requisition of the respondent, and, it may be, to vote for him also. Bell refused to do either one or the other in very plain terms. He said he had voted for White before, and he would do it again.

Bell said that Thomas Murray said to him, "Come with us this time, and I'll make it all right, or try to make it all right!" He is very positive of it. Thomas Murray denies very strongly having said that or anything like it. He says, "I said to Bell that, apart from elections and politics, I wished to sustain our name as business men, and if I could get Bell and my brother face to face, and if any injustice was done I would have it rectified, and that Bell should not let these matters interfere with politics anyway."

Matters standing in that way between the two principal parties, the evidence of John Robinson has to be considered. He says that Thomas Murray said, "If Bell had

been at a loss by his brother *previous to election matters*, he, Thomas, would make it all right, or try to make it all right; I mean by *previous to election matters*, that Thomas was referring to *business matters*."

No doubt he was referring to business matters; but the question is, was he referring to them in connection with the election contest then going on, and for the purpose of influencing Bell's vote? Bell said he was; Thomas Murray said he was not; Robinson is not very clear either way on the above statement. But he also said that Bell said he had lost $15 or $18 by the contract not being carried out, and that Thomas answered just as Bell had said, "he, Bell, had better come with us this time, and he, Thomas Murray, would make it all right, or try to make it all right!" which latter statement was expressly in connection with the then election proceedings.

The weight of evidence is, I think, rather with the petitioner than with the respondent; and if it were the only charge, it might be capable of being viewed somewhat differently than when it is one of a greater number, and all or many of which are supported by the evidence of the persons called to prove them, while they are explained or repelled by Thomas Murray in the like manner in which he has referred to this particular charge.

If effect has to be given to this charge, it must be felt to be exceedingly hard upon the respondent, for all that took place, even as Bell represents it, had not the slightest effect upon his vote. He refused from the first to support the respondent, and he declared he meant to vote for the petitioner. He declared also that he desired nothing in any form. He never accepted the offer or promise he says was made to him, and he declared at the time he would not and did not do so.

If, however, the *offer* of any valuable consideration is, as it is expressly declared to be, bribery by the 37th Vic., cap. 9, sec. 92, subsec. 1, it is not for the Court or Judge to interfere with the enactment otherwise than to give it effect when the penalty attaches.

2. The second charge relates to Augustus Mohns. He said Thomas Murray, about two weeks before the polling day, met him in Pembroke. He said witness had a good vote. He asked me who I was going to vote for; I said, nobody; he said, I had to vote. He asked who I voted for the last time; I said, Mr. Murray. He said, I would have to vote for him again. I said, no; I lost time every year. He said, he would come good for my time. The promise made to me by Mr. Murray did not induce me to go to vote.

Thomas Murray, for the defence, said as to the charge, "I asked Mohns for his name on my brother's requisition. He first declined; he did not want to lose his time in going to elections. I said, his time would not be lost; it was his duty to go. I explained to him my brother was the proper man to support; he was the Government candidate; and going to vote would be a day well spent. I said nothing to him of making good his time to him; I thought of nothing of the kind."

I have no reason to doubt the statement of the witness Mohns. He had no object in fabricating a story. The strong interest of Thomas Murray for the respondent's cause would induce him to go as far as he thought he safely could go in talking with the electors; and for that interest he might go further than he had intended to go, or thought he had gone in his conversations with them. I decide this charge solely by reason of the weight which the evidence of Mohns acquires from the concurrence, as it were, of that of the other witnesses, from their testimony being all adverse to that which was given by Thomas Murray.

3. The third charge is that relating to Robert Pollock. His case is that when Thomas Murray, Mr. Stone and Mr. Jackson, called upon him lately before the last election, "Thomas Murray asked me for my vote. I had not supported Mr. Murray before that. He asked me to support his brother. I called him to one side and I told him my objections. I said I was hard up then, and the

man that would oblige me I would oblige him. I went on to tell him of some matters, and I mentioned money, and he said, don't mention about money, the law is strict. As he was coming away he said to me, 'If I don't, call me no gentleman; and I would not that for half your farm.' No one else was present at the conversation. . . . Murray and I then went to the front part of the house where Stone and Jackson were, and Murray said to them, 'I think Mr. Pollock is all right,' or 'Mr. Pollock is going to give my brother his support or vote.' . . . It comes to my memory now that after I had said to him that I would oblige him who would oblige me, he said, 'Wait till after the election.' . . . I did not see Mr. Murray after that till the following day at the polling place in Westmeath. He asked me then if I was going to vote for his brother. I think I told him I was all right. I referred that day to our former conversation by saying 'it was all right.' . . . After the election I asked Thomas Murray if he could lend me a little money, and I would pay him interest on it. He said he had no money. He said, 'I think I gave you to understand I did not or could not promise you money on account of voting.' He said he had bought a lot of cattle, and he had not money to pay for them. I said I would give him any interest he asked." And he said he was influenced by what passed between him and Thomas Murray before the election, for "the impression made on my mind by our conversation was that he would oblige me after the election." I cannot say I was influenced by what he said the impression made on his mind was.

In cross-examination he said: "He, Thomas Murray, asked me for my vote while Stone and Jackson were by. I asked him to go apart." He recapitulated his evidence in chief.

Thomas Murray's account of the matter was as follows: "I said to Pollock I was going about getting names on my brother's requisition; that I supposed he knew my brother was a candidate. He said he did not know. He

would be likely to be friendly to those who would be friendly with him; that he said in presence of the other two. I said, I don't know what you exactly mean. If you mean I should hold out any inducements to you to get your vote, I wish you to understand I do not do so I want to conduct this election on legal grounds. Stone and Jackson said to Pollock he had better give me his name for my brother; that he was the Government candidate. Pollock then called me away from the others a little way. He made the same remark again to me. I said, I had already told him my mind upon it. He began to tell me his troubles and difficulties. I said, I did not want to hear them. He said he would like to borrow money. I said, Don't mention money; I did not want him to do it. He got excited. I pressed him to support my brother, and that he had better give me his name, as Stone and Jackson, and others of his neighbors, had done or would do. He said, Well, he did not know but he would give me his name; that I had the name of being a gentleman, anyway. That is all that was said. I did not say anything of the law being strict about money; I think Jackson said it to him. I said nothing to him of 'call me no gentleman;' nor did I say to him, 'If I don't, call me no gentleman.' I said nothing to him of 'half his farm' or of the whole of his farm. Nothing was then said of anything being done after the election. I did not say to him to wait till after the election. I saw him on the polling day. Did not speak to him on that day. I saw him about a month or so after the election in my store. He wanted me to lend him $100 or so. I said I had no money to lend; we required it all for our business. He said he did not know but I might lend him the money after the election. I said I did not give him to understand I would do so, and he must know it; and he said, Yes, he did know it. He said, Could he not get it from the other party? I said I did not know. The general impression was he voted the White ticket, anyway. He was annoyed. I did not give him to understand in any-

way, in any conversation with him, I would do anything for him in connection with the election; on the contrary, I tried to evade it."

In cross examination he maintained his original statement. He added he would not believe Pollock on his oath.

In this matter it was observed upon by the petitioner's counsel that Stone and Jackson, who were present, according to the evidence of Thomas Murray, at a good deal of the conversation spoken of by Pollock, had not been called as witnesses by the respondent. It is a fair subject of comment. If, however, they had been called, they could only have spoken to the earlier part of the conversation. It would certainly have been important to have had their testimony.

Here again is another witness opposed to the same witness for the respondent, and there is no reason to disbelieve him, especially, when it is of the same nature as that spoken to by the other witnesses on the other charges.

4. The fourth charge relates to Martin Melchar. All that took place, as he says, with him was that which happened on the polling day, when Thomas Murray asked him for his vote and if he were going to work on his side. The witness then said, "He, Murray, did not promise me anything. He said if I worked on his side or voted on his side, to go after the election was over to see him. I went to him after the election. He said I had not voted for him. I thought I was to get something. I thought I could go when I liked. I told him I had worked for him. He said I had not worked for him. He told me that right off on the street when I saw him."

The matter is not wholly free from some slight suspicion, but it is all so indefinite that it cannot be safely said there was a promise implied; there was certainly no express promise to do anything for the witness after the election. "Going after the election was over to see him" does not necessarily mean that he was to go for a corrupt purpose; it may or may not be so. It is a matter of fact

and of inference, and I think I ought not to infer it from the facts stated.

5. The fifth charge was spoken to by Antoine Rossorski. As to this charge, it is not disputed that Thomas Murray had a bet of $400 on the result of the Wilberforce poll, as before stated. Haase and Rossorski both say that Thomas Murray mentioned to them that he had a bet of $500 on the election. Thomas Murray denies having mentioned it to either of them. Rossorski says also that Thomas Murray told him he held such a bet, and he, Rossorski, could get some of it when he voted for the respondent, and Rossorski said, "That will do."

Haase says that Thomas Murray, on the same occasion, said to him, he, Murray, had such a bet, and he said, "I'll give you———," when he was called away and did not finish his conversation with him, but began talking with Ashmore of betting the $500 with him.

I think Rossorski's character is not so impeached by the evidence given against him by the Rev. Mr. Jenkyns that I must disbelieve him, considering the evidence in his favor given by Leach and Ashmore. I think also that the evidence of Haase shows a strong probability of Rossorski's account being a true one, for very nearly the same thing was, it may be inferred, being about said to Haase which it is said was said to Rossorski.

Rossorski has shown a very strong desire to unseat the respondent, and therefore his conduct and evidence must be very carefully considered, for he is plainly both an adverse witness and an adverse political partizan.

Thomas Murray also appears, with respect to the particular poll at which Rossorski was a voter, to have had an interest of a pecuniary nature of not the most satisfactory kind, considering the deep personal interest he had in the contest on behalf of his brother as well as of his party. The bet was that White would not have a greater majority at that poll than 15, while it turned out he had 20. While the voting was so close in that township, it was the interest of Thomas Murray, with a bet of $400

on the result of it, to expend some part of it by the acquisition of a few voters in order to gain the much larger part of it remaining.

And when to that are superadded the natural desire to win the bet just for the sake of winning it, although no money is dependent upon it, and the natural desire to carry the election successfully all over, which was secured by a further bet of $400, it appears, I think, the probabilities of the case are quite in agreement with the positive testimony of Rossorski, and which is corroborated in part by the evidence of Haase. This charge, I think, I must find to be sustained.

6. The sixth charge refers to the dealing with John Schultz. Here again there is a direct contradiction between the two witnesses. The one, Schultz, swears he was to have $22 for the cow if he voted for the respondent; the other, Murray, that the $22 was given upon Schultz's agreeing to drive the cow back to Murray's pasture if she broke from it and went back to Schultz's place. It must be admitted the consideration or inducement was one of a small amount. It is useless trying to reconcile the two statements. I should perhaps, as I have already said of the other charges decide this against the petitioner if this were the only charge, but as it is one of a series of charges, each one of which is supported by a different witness, I do not know what I can do even in so small, I may say so trivial a matter, unless I give effect to the accumulated weight of testimony, when I have no reason whatever to doubt the truth of the respective witnesses who maintain these charges.

7. The seventh charge is the one in connection with Andrew Halliday. He said Thomas Murray asked him if he might put the witness's name upon his brother's requisition. The witness said, Yes, if the other pleased, and the witness then said, Thomas Murray said that generally they did not forget their friends. He did not say it would be all right, nor anything of money. I do not attach any weight to this charge, even as it is stated, and besides, Thomas Murray denies it.

8. The eighth charge relates to the dealing with John Douglas. Here again the story is of the like character against Thomas Murray, an offer or promise made in the like indirect manner as in the other cases, and spoken to by a man and in a manner which caused no suspicion of the truthfulness of the transaction he spoke of.

Thomas Murray admits he tried to get Douglas's vote for his brother, and that they did talk aside for some time, and that Douglas did speak of $40 or $50 being due by him to some of White's people, and that he was afraid to act on Murray's side partly in consequence of it. He admits also that he said $40 or $50 was not a killing affair anyway, and that by the ballot the way of the voting would not be known, and that he did say at the second conversation, "Mr. Douglas, you know me well enough to know that I would not like to see any man injured." He denies any promise or offer made, or inducement held out, or stronger or different language having been used than he has mentioned, but he says he may possibly have said if Douglas voted for his brother, he, Douglas, would not be sorry.

Now, Douglas's story, in a few words, is that Thomas Murray said, after a good deal of solicitation on Murray's part for Douglas's vote, and after Douglas had told his wants, position and expectations, "If you vote for my brother you will not be sorry for it, and I will do the square thing with you;" and that he said so very soon after having said, as Douglas stated, "Hang it, $40 is not much." A very little more than Murray has admitted would convert his story into Douglas's account of the transaction. But as they each stand, there is evidence from which an offence may be inferred in the one statement but not in the other. And the question is, which of the two accounts am I to act upon? As I have already said, I think, as I do not disbelieve Douglas, the probabilities for what has been before said oblige me to accept of his narrative, although, as I have said more than once, were that the only charge made, I should not consider it to

be substantiated against the contradiction given to it by Thomas Murray.

9. The ninth charge relates to the sale of oats by John Luck, Jr. He said that Mr. Foley, the respondent's assistant bookkeeper, told him the price of oats was 40c. a bushel, but he would give the witness 43c. if he would vote for Mr. Murray, and Luck answered he was not selling his vote, but if he, Foley, would give the 43c. a bushel, he, Luck, would take him at his word, and that the oats were sold accordingly; Foley telling Luck not to tell the other clerk who weighed the oats what price he was getting. Luck had 5 or 6 bags of oats. Foley denied this statement. He said Luck asked 45c. a bushel, and he split the difference with him, and gave him 42½c. It is not clear that there is any agency proved on the part of Foley to bargain in the manner represented, although there was a requisition in favor of the respondent left on the counter, and those in the shop were to ask persons to sign it. But if there were, Foley's denial is entitled to as much credit as Luck's assertion; and the transaction, altogether perhaps about 15 bushels oats, at 3c. per bushel extra would only be 45c., does not induce one to lay any great stress upon it.

It is true that farmers and others are very particular and pertinacious about the highest cent for their produce or articles of sale, and that a very small advance of price may operate as a sufficient inducement to some persons, even on a small quantity of anything, to consider how they should vote at an election, or to change their vote, or to make a promise to vote. And the smallness of the transaction is not a reason for disbelieving the whole story. And if the story be proved the charge is maintained, and the offence is just as complete as if the inducement, in place of being a small one, had been a large one. I consider, as to this charge, that Mr. Foley's evidence has satisfactorily answered it.

There were many other charges attempted to be proved,

which failed; and the evidence was very long. The case must depend upon those already referred to.

I am obliged, from the conclusion I have come to, to give effect to the prayer of the petitioner. And I shall certify, also, that no corrupt practice has been committed, according to the evidence, by or with the knowledge and consent of any candidate at the said election; that Thomas Murray, the agent of the respondent, has been proved at the trial to have been guilty of corrupt practices, for and in respect of and towards the six persons; that I have found these charges laid against the respondent have been proved; and that corrupt practices have not extensively prevailed at the said election.

The costs of the proceedings will follow the result. The petitioner will receive from the respondent the costs of those charges on which he has succeeded; and he will pay to the respondent the costs of those charges on which he has failed.

If this election fail, it is only from the strictness, perhaps from the severity and harshness, of the provisions of the Election Law. I have no doubt that the offers and promises I have been compelled judicially to act upon, had not, assuming them all to have been made, the slightest effect upon any one of the votes or voters, with respect to which and to whom the offers or promises are said to have been made. And undoubtedly they had no effect upon the general result of the election, which was, with the exception of these mere offers, conducted, so far as I have been able to discover, upon both sides with general purity, and upon the whole, I think, with a desire to conform to and keep the law. If relief be given it must come from the Legislature; I can only do what I am obliged to do, which in many cases is as painful to the personal feelings of the Judge, apart from the consideration as to which side in politics the respondent may be upon, as any duty which could possibly be imposed upon him.*

* The judgment in this case was not approved by the Court of Appeal in the *Muskoka case*, *ante* pp. 468 and 474.

The petitioner appealed from this judgment to the Court of Queen's Bench; but the Court held that as the learned Judge had found that corrupt practices had been committed by an agent of the respondent, the appeal should be dismissed.

(10 *Commons Journal*, 1876, p. 21).

MONCK.

BEFORE MR. VICE-CHANCELLOR BLAKE.

TORONTO, *8th, 10th and 17th January, 1876.*

PETER GRANT *et al., Petitioners*, v. LACHLIN MCCALLUM, *Respondent.*

Ballots—Scrutiny—37 Vic., cap. 9, ss. 28, 45, 80.—Effect of neglect of duty by a deputy returning officer.—Marking ballot paper.

The neglect or irregularities of a deputy returning officer in his duties under the Dominion Elections Act, 1874, will not invalidate an election, unless they have affected the result of the election or caused some substantial injustice.

Held, therefore, that the neglect of a deputy returning officer to initial the ballot papers, and to provide pen and ink instead of a pencil to mark them, would not avoid the election.

The following irregularities in the mode of marking ballot papers, *held* to be fatal:

1. Making a single stroke instead of a cross.
2. Any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him.
3. Crosses made at left of name, or not to the right of the name.
4. Two single strokes not crossing.

The following irregularities *held* not to be fatal:

1. An irregular mark in the figure of a cross, so long as it does not lose the form of a cross.
2. A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name.
3. A cross with a line before it.
4. A cross rightly placed, with two additional crosses, one across the other candidate's name, and the other to the left.
5. A cross in the right place on the back of the ballot paper.
6. A double cross or two crosses.
7. Ballot paper inadvertently torn.
8. Inadvertent marks in addition to the cross.
9. Crosses made with pen and ink instead of a pencil.

The election held on the 29th January, 1874, having been avoided (10 *Commons Journal*, 1876, p. 6.), a new election was held, at which the respondent and Mr. James

D. Edgar were candidates. The respondent was declared elected by a majority of four votes over Mr. Edgar. A petition was then filed, claiming the seat for the latter, on a scrutiny of the ballots.

Mr. Hodgins, Q.C., *and Mr. Edgar*, for petitioner.

Mr. McCarthy, Q.C., *and Mr. F. Osler*, for respondent.

The objections taken to the ballots appear in the judgment.

BLAKE, V.C.—The parties did not desire that I should state a case for the opinion of the full Court in respect of the matters raised, which seemed to me to involve questions that it would have been well to have had settled by the Court on a rehearing. I proceed, therefore, at once to dispose of the petition, so as to enable the party dissatisfied, if he pleases, to appeal the case during the coming month.

The considerations applicable to two of the questions raised appear to me to differ from those which should regulate the disposition of the other points discussed. I refer to those irregularities which arose from the acts of the deputy returning officers—the one, the use by the electors, in some instances, of pen and ink, supplied by this officer in place of a pencil; the other, the use of ballot papers in the election not marked by the deputy returning officer, as contemplated by the Act.

The duty cast upon this officer is clearly defined by the statute. The 2nd clause in the "Directions for the guidance of electors in voting," in Schedule I, is as follows: "The voter will go into one of the compartments, and with a pencil there provided place a cross opposite the name or names of the candidate, or candidates, for whom he votes, thus ×;" and subsection 4 of section 28 enacts that the returning officer is to furnish each deputy returning officer "with the necessary materials for voters to mark their ballot papers." The latter portion of section 43 deals with the other point: Each elector "shall

receive from the deputy returning officer a ballot paper on which such deputy returning officer shall have previously put his initials." It is to be regretted that these officers, by their culpable neglect in omitting to observe these plain and simple rules, should cause the difficulties which have arisen in the present case. Having undertaken these duties, they should have fulfilled them with intelligence, care and honesty, and they may be deservedly censured for involving the candidates in the difficulties and expense connected with the present scrutiny. It does not better their position that possibly their irregularities and mistakes may be covered by a healing clause in the Act. Section 80 makes the following provision: "No election shall be declared invalid by reason of a non-compliance with the rules contained in this Act as to the taking of the poll . . . or of any mistake in the use of the forms contained in the schedules to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election." The principles laid down by the Act seem to be secrecy in voting, and the removal of difficulties in the way of an elector exercising his franchise.

There seems to be no doubt that the election in question was conducted in accordance with these principles. It cannot be said that the irregularities complained of affected or bore upon the result of the election, nor were they calculated to do so. It was not even argued that any injury of the kind has here arisen—that any other than the provided ballot papers had been used, or that the vote of any one not entitled to vote had been received. The neglect of the officer should not be visited on the elector or candidate, unless it is apparent that it has or might have caused some substantial injustice. Of the 132 votes cast in Pelham division, No. 1, it is said 130 are open to the objection that the ballot papers were not initialed by the deputy returning officer. I do not

think I should lightly disfranchise so large a body of the electors, nor should I lightly say the irregularity is of such a nature as to disfranchise, and this disfranchisement being so general, the whole matter must be set at large and a new election ordered.

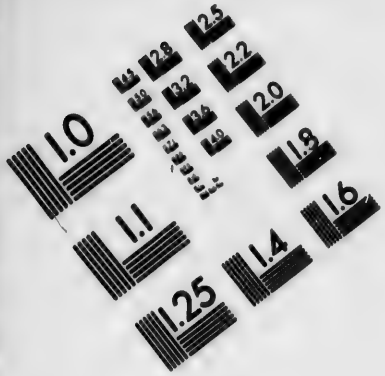
I am of opinion that, under this clause, irregularities of the nature here relied upon in order to invalidate the election must be substantial and not mere informalities; that the informality must be of such a nature as that it may reasonably be said to have a tendency to produce a substantial effect upon the election. I do not think the irregularities here complained of in any manner interfered with the election being a real one, nor did they in any manner affect the result, and therefore they cannot be raised as grounds for avoiding it. This view is corroborated by the finding in the *Hackney case* (31 L. T. N. S. 72). There Mr. Justice Grove says: "An election is not to be upset for an informality or for triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to affect the result of the election."

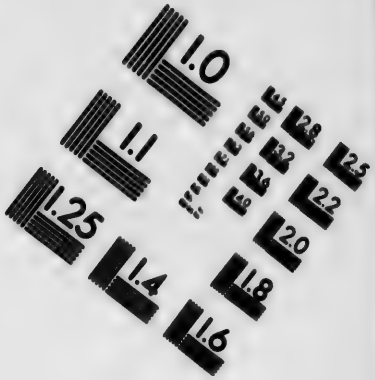
It must also be borne in mind that if the Court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him. I therefore disallow the objections taken to votes given by means of ballot papers marked with the pen and ink provided in the polling booth, and to those given on the ballot papers provided by the returning officer but not initialed by him.

There were three other points argued before me: 1. What mark sufficiently expresses the intention of the elector as to his voting? 2. Where must this mark be placed? 3. What additional mark warrants the rejection of the ballot paper? The following portions of section 45 and of Schedule I. deal with the first two of these questions: "The elector . . . shall . . . mark his ballot paper, making a cross on the right-hand side, opposite the name of the candidate . . . for whom he intends to vote." "The voter will . . . place a cross opposite the name . . . of the candidate . . . for whom he votes, thus ×." It is also to be noted that in the form given the cross is not exactly opposite the word "Roe," or the words "Richard Roe," but appears as follows:

II.	ROE. RICHARD ROE, Town of Prescott, County of Grenville, Merchant.	×

I think that every reasonable latitude that can be given to an elector as to the form or position of his mark, without a direct evasion of the statute, should be given to him. The Act, however, requires that this mark should be a cross, and it also requires that this cross should be on the right-hand side, opposite the name of the candidate. I cannot say, therefore, that, so far as the mark is concerned, the elector has complied with the Act when in its place he puts a single line. I must rather conclude that the elector, for some purpose, desired to go merely through the form of voting, and expressed this intention by placing such a mark there as evidenced his design of not complying with the requirements necessary to allow his ballot to be counted for either of the candidates. The single stroke does not show a concluded intention of voting, for only a portion of that which is the defined figure is thus made. The voter is told that if he puts a cross in a particular place, which is well defined on his





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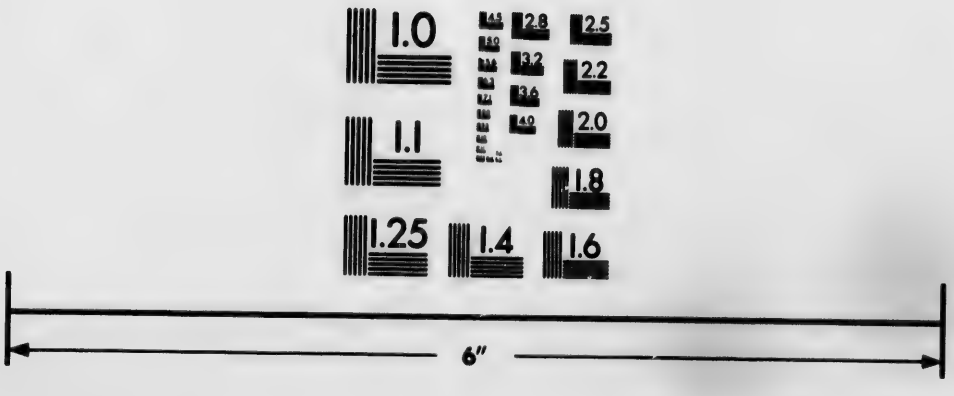

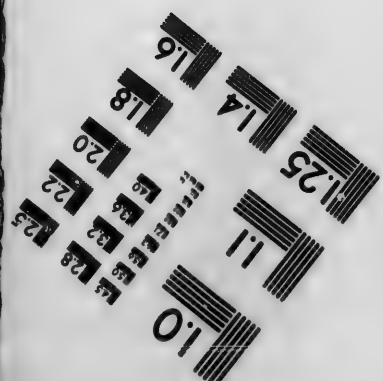

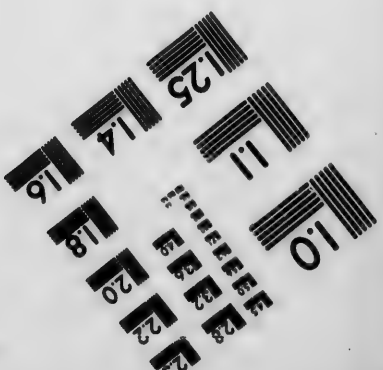

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ballot paper, his vote will be accepted; if he does not choose to do that, he loses his vote. It may be that at first this rule will work hardly; but soon a matter so easily comprehended will be perfectly known throughout the country. In the meantime, the price paid for obtaining secrecy in voting will be the virtual disfranchisement of a small proportion of voters who have not learned how to vote under the present system.

Until the mark loses entirely the figure of a cross, I think it should be allowed. It may be imperfectly made; there may be additions to it from nervousness, or awkwardness, or by way of embellishment. There may be several lines crossing another line or other lines; the one line may lie upon the other at any angle; the one line may cross the other but a short distance; yet so long as it is possible to say the figure can be taken as that of a cross, it would be the duty of the Court to say the intention of the elector is sufficiently defined to allow his ballot to stand. As with the form of the cross, so with its position. I do not think it necessary that it should be exactly opposite either the word "Roe" or "Richard Roe." It may be above or below a line produced from the end parallel with the end of the ballot-paper It need not be in the compartment in front of the name, but the moment it ceases to be on the right-hand side, then it is no longer in the place which indicates an intention of voting, and therefore must be rejected. If it be correct that the form of the mark, such as a line or circle, vitiates the ballot, I do not think it unreasonable to say that the position of the mark may have the same effect. A man who pretends to vote puts a stroke and nothing more, and knows his ballot paper will be rejected; a man who does not want in reality to vote may just as well say, "I will place my mark or cross to the left of the name and thus, though apparently voting, vitiate my ballot paper." I think it is safer, in a case where the wording is so plain as here, to require a reasonable compliance with that which it lays down as being the requirements

of a ballot paper which is to be accepted, rather than enter into a minute examination of the position of each cross, and endeavor to assign some reason in each case for that which virtually is an evasion of the plain language of the Act.

The third point raised depends on the true construction of section 55 and Schedule I.:

The returning officer shall reject all ballot papers "upon which there is any writing or mark by which the voter could be identified." "If the voter places any mark on the ballot paper or envelope by which he can afterwards be identified, his vote will be void and will not be counted." The marks found on the ballot papers are: *(a)* Additions or embellishments to the figure intended to represent the cross, and by which such figures might be distinguished from other crosses. *(b)* Marks made inadvertently near the cross, and which have arisen evidently from nervousness or awkwardness. *(c)* Distinct lines or figures made in various places on the ballot paper.

The Act does not say any mark, or any mark deliberately made, but a writing or mark by which the voter could be identified. I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself, such as the initials, or some mark known as being one the voter is in the habit of using. If there be not this restriction, then it will naturally follow that every peculiarity about every cross should be scanned in order to see whether some of the additions were not put there designedly so as to mark distinctively that particular ballot paper. Any mark in addition to the cross might thus avoid the vote; and, on the same principle, any alteration in the position of the cross from a rigid observance of what is set forth in the Act should be taken as a means of denoting the ballot as one marked so as to require its rejection. I think if the Legislature intended this result we should have found different language used from that which we have in this enactment.

I proceed on the above rules to scrutinize the votes objected to on both sides. The petitioner had 1,329 votes and the respondent 1,333, leaving a majority of four votes for the respondent.

In Canboro', No. 1, there were four ballots for Mr. Edgar rejected, which rejection is objected to. This affords a fair example of the necessity of observing with exactness the rules prescribed by the Act. The deputy returning officer here employed pen and ink. The crosses in these four cases were distinctly made opposite the name Edgar, and in the proper position on the ballot paper. The voter folded the paper down at once, and accurately, which made an impression opposite the name McCallum. We have by this means a cross opposite the name Edgar, and another cross identical in form opposite the name McCallum. On a close inspection it is apparent that the upper cross is the original one, and that the lower, or McCallum one, is caused merely by the paper being brought into contact with the mark, the ink of which was not dry. These four votes should therefore be allowed to Edgar.

Caistor, No. 1.—There was a cross to the left of the name properly rejected.

Dunnville, No. 1.—There were four votes rejected for Edgar. One was improperly rejected, the mark being a cross to the right hand and opposite the name. Two were crosses to the left of the name, one being simply a stroke with a pen through the figure "1" of the year "1875," which appears on the ballot paper to the left of the name, and the fourth was a single stroke. These three were properly rejected.

Moulton and Sherbrooke, No. 1.—There was a miscount. The numbers returned were thirteen for Edgar and one hundred and fifteen for McCallum, whereas it should have been twelve for Edgar and one hundred and sixteen for McCallum.

Wainfleet, No. 1.—There were four rejected for McCallum, one of which I allow, being a well defined cross with a line running through its centre.

Wainfleet, No. 2.—There were two rejected for McCallum; one properly, as being a cross to the left of the name; the other improperly, there being a well defined cross opposite "McCallum," and a single stroke opposite "Edgar."

So that up to this point there should be added to the number of votes polled for Edgar, as being improperly rejected, five, and there should be deducted for the miscount, one; leaving the total addition to be made four, and thus giving the number of votes polled for him thirteen hundred and thirty-three; and there should be added to the number of votes polled for McCallum, as being improperly rejected, two, and for the miscount, one; thus making the number of votes polled for him thirteen hundred and thirty-six.

Of the votes allowed by the returning officer, I find the following:

Caistor, No. 1.—An inadvertent pencil mark, allowed; a ballot paper inadvertently torn, allowed.

Caistor, No. 3.—One single stroke disallowed; one cross with a line before it, allowed.

Canboro', No. 1.—A ballot paper inadvertently torn, allowed; an inadvertent additional pencil mark, allowed; four marked with pen in place of pencil, allowed; two with single lines in place of crosses, disallowed; one ink cross blotted, allowed.

Canboro', No. 2.—One cross not to right hand of name, disallowed; one, not a cross—a circle with two lines underneath—disallowed; one with a cross in the proper place and a second cross erased, allowed.

Dunnville, No. 1.—A single stroke, disallowed; a double cross, allowed.

Dunnville, No. 2.—One single stroke, and one cross not to the right hand of the name, disallowed.

Gainsboro', No. 1.—One cross not to the right hand of the name, disallowed; one with a mark on the cross, allowed; two with single strokes, disallowed; two with

a cross to the left hand of the name, disallowed; one ballot paper torn, allowed.

Gainsboro', No. 2.—One cross not to the right hand of name, disallowed; a ballot paper inadvertently torn, allowed; two with a cross not to the right hand of name, disallowed; one ballot paper inadvertently torn, allowed; one with a cross properly placed, but with an obliterated mark in the McCallum column, allowed.

Gainsboro', No. 3.—One single stroke, disallowed; two single strokes, and two crosses not to the right hand of the name, disallowed.

Gainsboro', No. 4.—One ballot paper inadvertently torn, allowed; one with an inadvertent mark under the cross, allowed.

Moulton and Sherbrooke, No. 1.—A cross on the back of a ballot paper for McCallum, allowed.*

Moulton and Sherbrooke, No. 2.—One with a single stroke, disallowed; one with three crosses—the one in the proper compartment, the other across the name McCallum, and the third in the left compartment—allowed. These crosses were so placed, I think, because the voter was uncertain where the mark should appear. As there is a cross rightly placed, I do not think the vote should be rejected because of the additional crosses. One single stroke, disallowed.

Moulton and Sherbrooke, No. 3.—One single stroke, and two with crosses not to the right hand of the name, disallowed; a fourth, with the cross to the right hand of the name in small letters, allowed; two single strokes, disallowed.

Pelham, No. 1.—Two crosses opposite name, allowed; an erased mark opposite Edgar's name, in addition to a cross opposite McCallum's name, allowed; one single stroke, disallowed.

Pelham, No. 3.—One single stroke, disallowed.

* This decision was not followed in the *South Wentworth case, ante* p. 536. See also the *Berwick-upon-Tweed case* (3 O'M. & H. 183).

Wainfleet, No. 1.—Two with a cross not to the right hand of the name, and an additional mark, disallowed.

Wainfleet, No. 2.—Two single strokes and one cross not to the right hand of the name, disallowed; one single stroke, disallowed.

Wainfleet, No. 3.—One single stroke, disallowed; one with a second cross, allowed, it not appearing that the mark identifies the voter.

This disposes of all the objections made; and deducting the votes disallowed Edgar (19) from the votes allowed (1,333), would leave the number of votes polled for him 1,314; and deducting in like manner the votes disallowed McCallum (18) from the votes allowed him (1,336), would leave the number of votes polled for him 1,318. This would give him, as the result of the investigation, a majority of 4 votes, and he is therefore entitled to retain the seat.

I have therefore to declare that Mr. McCallum has been duly elected and returned, and I shall certify that to the Speaker.

(10 *Commons Journal*, 1876, p. 47).

HALTON.

BEFORE MR. JUSTICE PATTERSON.

MILTON, *10th to 12th November, 1875.*

BEFORE THE COURT OF APPEAL.

TORONTO, *21st December, 1875, and 22nd January, 1876.*

DAVID CROSS *et al., Petitioners,* v. WILLIAM MCCRANEY, *Respondent.*

Unsupported Offers of Bribery—Payment of Travelling Expenses—"Wilful"—"Corruptly"—Limited Agency—Agents—Appeal.

A promise to work for a voter, made without reference to the election and as a joke, not evidence of bribery.

A charge that the respondent promised to give a voter certain work to do if he voted for him, was disproved by the evidence of the respondent and another, and by the admissions of the voter made to other parties.

One L., a voter, hired a horse and cutter on the day of the election, and with M., a scrutineer for the respondent, drove to the poll and voted. The day after the polling L. and M. returned to their homes, and on the way M. gave L. $4 to pay for the horse and cutter.

Held, 1. That the payment of $4 having been made after the election, and not having been made corruptly to influence the voter to vote for the respondent, was not a corrupt practice or a wilful violation of sec. 96 of 37 Vic., cap. 9.

2. That M's. agency was a limited one, and had ceased before the payment in question.

Semble, That the term "wilful," as used in sec. 98, cannot be construed in a narrower sense than the term "corruptly" in sec. 92, subsec. 1; and that the term "corruptly" does not mean wickedly, or immorally, or dishonestly, but doing that which the Legislature plainly meant to forbid;—as an act done by a man knowing that he is doing what is wrong, and doing it with an evil object.

A year before the election the respondent paid part of the charges of a lawyer retained by one O. to attend the revision of the assessment rolls. O. at the time of the election attended one of the respondent's meetings at which he stated that his own mind was not made up, but he urged that the respondent ought to have the support of the voters, he being a local man; and in three or four instances O. asked voters to vote for the respondent. The respondent and his friends distrusted O., and in no way recognized him as acting with them.

Held, That O. was not an agent of the respondent for the purposes of the election.

The evidence in support of the offer of a present, or something nice, to the wife of a voter to induce the voter to refrain from voting, showing that it had reference to a different election than the one in question, an amendment of the particulars was refused, and the charge dismissed.

The charge against the respondent and one B., of an offer of money to, and to procure an appointment as Justice of the Peace for, a voter in consideration of his voting for the respondent, was supported by the evidence of the voter, who showed bitter hostility to B.; but the charge was denied by the respondent. And the evidence showing

the statement to be improbable, and that the election contest was carried on by the respondent with a scrupulous and honest endeavor to avoid any violation of the law against corrupt practices, the charge was dismissed.

The former election for this constituency having been avoided(9 *Commons Journal*, 1875, p. 22), a new election was held, at which the respondent was elected. A petition against his election was then presented, containing the usual charges of corrupt practices.

Mr. Hector Cameron, Q.C., *Mr. James Beaty*, Q.C., *and Mr. D. McGibbon*, for petitioners.

Mr. Bethune and Mr. John Dewar for respondent.

The evidence affecting the election appears in the judgment.

PATTERSON, J.A.—The particulars in this case set out about one hundred charges of bribery by the respondent or his agents. Evidence has been given respecting forty of these charges. At the close of the evidence the counsel for the petitioners confined the charges to seven cases, and very properly did so, as the evidence given did not afford a shadow of support to the other thirty-three. The seven charges insisted on were the following, viz.:

1. Bribery of John Allison by John Ramsay, an agent of respondent, "promising to work for Allison without charge." 2. Bribery of John Fluelling by the respondent, "by promise of money, or receiving money for his vote, and promise of work or employment after polling day." 3. Bribery of John Lambert by John McLeod, an agent of respondent, "by promise to pay and payment of travelling expenses from Guelph to polling place." 4. Bribery of John Peake by Wm. Caldwell, an agent of respondent, "by promise of money." 5. Bribery of John H. Campbell by Dr. E. J. Ogden, an agent of respondent, "by promise of employment for himself and son, for his vote and influence." 6. Bribery of Nathan Roberts by the respondent, or by William Barber, his agent, "by promise of a present, or something nice," to Christina Robins, his wife, after election. 7. Bribery of Allan McDougall by the respondent,

"by promise of commission as Justice of the Peace; also of money and check for money, and by threat to prevent his procurement of any office." And bribery by William Barber, the agent of the respondent, "by promise of commission as Justice of the Peace; also of money and check for money."

I think the petitioners have failed to establish any of these charges.

The evidence in support of the Allison case is that of Allison himself, and is to the effect that he met Ramsay at a sawing bee; that Ramsay talked about the elections in general, and about other parties to whom he was to give a day's sawing for the election; on which Allison said he wished Ramsay would give him a day's sawing, and he would vote for the respondent; and Ramsay said it was a bargain, and he would do so; and that then Allison, after thinking of the matter for two or three minutes, said he would not take it. Allison is a farmer, owning one hundred and fifty acres of land. Ramsay was called for the respondent, and so was one Joshua Norrish, who had been at the bee. Their account is not in conflict with that given by Allison, as far as his statement goes; and their account of what was said is, I am satisfied, the true one.

The facts were, that on the 19th of January, 1875, the day after the election for the Local House, at which Mr. Barber had been returned, a party of eight neighbors were at a sawing bee at the residence of a Mr. Marks. The eight persons there belonged, some to the Reform party and some to the Conservative. They were joking, "or talking nonsense," as one witness says, about the Barber election, and Allison said, in what, I have no doubt, was mere good-natured banter, that Ramsay was sawing a day for Marks, and would be sawing a day for Kitchen, another of the party, and a day for others, because they voted on his side; and Ramsay, carrying on the joke, said, "Yes, and I will go and saw a day for you." This was not said with reference to the then coming election

of the respondent; and it is impossible to believe either that it was said as anything but a mere joke at the time, or that Allison could have for a moment supposed that Ramsay had any idea of influencing his vote, or that his vote could be influenced by the offer of a day's sawing.

Fluelling lives in Oakville, and works at carpenter work wherever he gets a job. His evidence is, that about three weeks before the election he met the respondent on the street in Oakville, about one hundred and fifty yards from the respondent's office. That the respondent asked him if he was going to support him, and he told him he had not made up his mind what to do, when the respondent told him he would have a lot of work to do in the spring, and that if Fluelling would vote for him he would give him work to do; and that Fluelling then said he thought he would vote for him. He said also that he had not asked for the work, because he has had work to do. The respondent and his foreman, Mr. Conkrite, gave a very different account. Their evidence is, that after Fluelling had been asked by respondent in the street if he would help the respondent in the election, and said that he would see, or that he did not know, the respondent went to his office; that Fluelling asked the respondent if he had any work to do; that respondent, without giving any answer, went into the office and asked Conkrite if he had any work for Fluelling, and was answered that he had none that he could then set him at, but that if any turned up he would give him a job; and that the respondent expressly left him to deal with the foreman, and made him no promise, telling him he would do nothing about work because it was election times. I am satisfied that no such promise or offer was made in the street as Fluelling swears to; that the parties went into the office, and that the matter was talked of there, which Fluelling entirely conceals in his evidence; and that no promise or offer was made, either by the respondent or his foreman; but that all that was done was that the foreman did not give any work then; and did not do more than say that if

any turned up he might give Fluelling a job; and that this was not to induce him to vote or to refrain from voting. The evidence of the respondent and Conkrite is entirely supported by evidence of another kind, which is itself supported by Fluelling's own evidence, viz., that when the respondent learned from the particulars delivered that this charge was made, he saw Fluelling himself, and had him also visited by Conkrite and by a Mr. Young, and questioned as to the charge, when Fluelling always, in the most emphatic manner, denied that any offer or promise had been made to him.

The facts touching the Lambert charge are, that Lambert lives in Guelph and has a vote in Stewarton. Mr. McMillan, a lawyer in Guelph, was employed to act as scrutineer for the respondent at the poll at Acton. Mr. McMillan asked Lambert to come down to the election if he could: and Lambert, who had intended to come down on some other matter, postponed his trip until the polling day. On the polling day, from obstruction of the railway by snow or some other reason, it became necessary to drive from Guelph to Acton in order to get there in time. Mr. McMillan and Mr. Lambert, who were to go together, went to different livery stables to try to find a horse and cutter—McMillan going to one place and Lambert going to another—and it happened that Lambert found one and hired it. They drove to Acton. The horse and cutter were left there. Lambert went by railway to Georgetown, and from that made his way to Stewarton, where he voted, and then made his way back to Acton. On the day after the election Lambert and McMillan returned with the horse and cutter from Acton to Guelph, and on the way McMillan gave Lambert $4 to pay for the horse and cutter, and on his reaching Guelph he paid that money to the livery stable keeper. There had not been anything said before coming down as to who was to pay for the conveyance. In the respondent's return of election expenses is included a sum of $18 paid to McMillan, but it is not shown that the respondent

knew anything of the payment to Lambert, or that that payment formed part of the $18.

This charge is urged as a violation of sec. 96 of 37 Vic., cap. 9, as the payment of the travelling expenses of a voter, which by that section is declared an unlawful act, while sec. 98 declares that any wilful offence against sec. 96, amongst others, shall be a corrupt practice. I do not think the word "wilful," whatever may be its meaning in this section, can be construed in a narrower sense than the word "corruptly," in sec. 92, subsec. 1. A payment of money for the travelling expenses of a voter was held to be a payment in order to induce him to vote, in *Cooper* v. *Slade* (6 H. L. Cas. 746), and, under the circumstances in that case, was held to be a corrupt payment. The distinction between that case, where there appeared to be a promise to pay the expenses conditional on the voter voting for a particular candidate, and a case like the present, where there is no pretence of a contract, is pointed out by Mr. Justice Mellor in his judgment in the *Bolton case* (2 O'M. & H. 145). In *Cooper* v. *Slade*, Mr. Justice Willes, in his opinion, delivered in the House of Lords, says, that "corruptly," in the section in question, "does not mean wickedly or immorally or dishonestly, or anything of that sort, but with the object and intention of doing that which the Legislature plainly means to forbid." Martin, B. somewhat more fully defines the expression in the *Bradford case* (1 O'M. & H. 37, 39) as "an act done by a man knowing that he is doing what is wrong, and doing it with an evil object." The present charge, if established, would in my opinion be an offence under subsec. 1 of sec. 92, as well as under secs. 96 and 98. In each case I think the same rule of construction must apply, and that a payment made after the election would not be a corrupt practice, as a wilful violation of sec. 96, unless it would be corruptly made within the proper construction of sec. 92. And I am of opinion that the evidence entirely fails to attach this character to the payment of the $4 by McMillan to Lambert. I am further of opinion that

McMillan was not the agent of the respondent in this matter. His only authority was to act as scrutineer at the Acton poll; and there is nothing from which any more extensive authority can be implied; and his agency had ceascd before the payment in question.

The case of Campbell is a case of the grossest and most disgraceful violation of the intention and object of the enactments against corrupt practices. I should fail in my duty if I did not report the names of John H. Campbell and Dr. Ogden as having been proved at this trial to have been guilty of corrupt practices; and I trust that in the interest of public justice and morality, the penalties provided by the statute may by enforced against them. Dr. Ogden appears, from the evidence, to have occupied a position of respectability and influence, and Campbell appears also to have been in a respectable position, and to be of high standing as an Orangeman. According to Campbell's own evidence, he agreed with Dr. Ogden for a payment of $100 to refrain from voting against the respondent. Two letters which he produced show further negotiations of a corrupt character, and the other evidence of Ogden's statements induces the belief that the payment of $100 was, besides purchasing the vote of Campbell, or procuring him to refrain from voting, to procure his influence in affecting the votes of Orangemen with whom he had influence. It is clear, however, that Ogden was in no sense an agent for the respondent; the only communication shown between him and the respondent or his agents was his communication to Mr. Young of the bargain he had made with Campbell, when it was at once repudiated by Mr. Young on the part of the respondent. The only other acts relied on as showing agency were that, a year before the election, the respondent paid part of the charges of a lawyer whom Dr. Ogden had retained to attend the Court of Revision and County Judge on the revision of the assessment rolls; that the respondent once supported Dr. Ogden when he was a candidate at a municipal election; that at the first meeting held in Oakville for the

respondent as candidate for election in the late contest, Dr. Ogden was present, and being called on by some of those present, spoke to the meeting, professing that his own mind was not made up, but urging that as neither of the candidates was a Conservative, the respondent ought to have the support of the Oakville voters, as being a local man; and that in three or four instances Dr. Ogden asked voters to vote for the respondent; while, on the other hand, it appears that the respondent and his friends distrusted Dr. Ogden, and in no way recognized him as acting with them, though they were aware, or supposed, that he was on that occasion supporting their side rather than the opposite party, with whom he had acted before.

Peake swears that he was offered $20 by William Caldwell to vote at both elections for the respondent and for Mr. Barber, or to stay away from the election. The evidence given by Mr. Caldwell and by Dr. Robinson leaves no room to doubt that nothing of the kind, which Peake swears to, took place, and that his story is a simple fabrication.

In support of the Robins charge, Mrs. Robins, the wife of Nathan Robins, gives evidence that the respondent and Mr. Barber came together to her house, and that there Mr. Barber said he would give her a nice present if she would get her husband to stay away from the election or to vote for Barber. Nathan Robins and his son gave evidence in corroboration of Mrs. Robins, and the whole statement is directly denied by Mr. Barber, whose evidence is supported by that of the respondent. There was nothing in the demeanor of Mrs. Robins or her manner of giving her evidence, either in chief or on cross-examination, to suggest the idea that she was not telling what she believed to be the truth. I was impressed very differently by both the husband and son, and their evidence very materially weakened the credence which, if they had not been examined, I should have been inclined to attach to the evidence of Mrs. Robins. If I had to decide merely on the weight of evidence as between the

Robins family and the respondent and Mr. Barber, I should find it difficult, if not impossible, to say that the petitioners had satisfied me that the charge was true. I should find in favor of the respondent, as I see no ground for attaching more weight to the evidence of Mrs. Robins than to that of Mr. Barber. The evidence, however, does not in any way support the charge; there is no evidence that Mrs. Robins was solicited at all in respect of the election now in question. The evidence of all the three, wife, husband and son, is that it was Mr. Barber's election alone that was spoken of by Mr. Barber to Mrs. Robins; and besides all this, the offer spoken of was an offer of valuable consideration to Mrs. Robins to induce her husband to refrain from voting, which is a distinct offence under section 92 of the statute, and is not the offence charged in the particulars. I was asked to allow an amendment of the particulars in this respect, but refused, as the evidence was not such as to establish any offence in respect of the election now in question, or to show that the ends of justice required that the amendment should be made.*

The McDougall charge comes before me in rather unusual circumstances. It appears that McDougall was keeping out of the way to avoid service of a subpœna, and all the efforts made had failed to reach him, or to discover where he was, until a late period of this trial. An application was made to me to postpone the trial after the other evidence for the petitioners had been given, to afford time to prosecute the search, and I granted the application so far as to allow this charge to stand until the respondent's evidence on the other charges had been given. At the last moment the petitioners succeeded in producing the witness. The evidence of McDougall was to the effect that the respondent had called at his house in December, 1874, and asked for his vote, when he told him he had promised to vote for his opponent, Mr. Chisholm, and that on that occasion McDougall had

* See *Halton case*, Provincial Elections, p. 283 *ante*.

mentioned a grievance which he had against Mr. Barber, because in a recent appointment of justices of the peace by the Ontario Government the school section in which McDougall lived had been overlooked, no one in that section having been included in the commission; and that the respondent excused Mr. Barber, and took the blame on himself, saying that he and others had made up the list of persons to be recommended for appointment in Robinson's hotel, and that list had been given to Mr. Barber; that on Saturday, 16th January, the respondent and Mr. Barber had called together at his house; that Mr. Barber had asked for his vote, to which he replied, that Mr. Barber must have considerable brass in his face to ask a vote from him or anyone else in the school section, when he had passed over the section in not giving it a magistrate. That then the respondent took him into a room, and said that he wanted his vote and his boys', saying that he understood that Mr. McDougall had considerable influence in the county, and that he wanted his vote, and wanted to know if he would not make an assignment to him and Mr. Barber of his rights, and the right of his family of the county. I understood, and was about to note the words as "the right of his family in the county," but the witness corrected me by saying *of* the county, or *off* the county. I am not sure which word he intended. The witness continued, that he told the respondent he could not do what he asked; that the respondent then again asked if he could not vote for him, when Mr. McDougall said, as he had before to. him, that he had promised his vote to Mr. Chisholm, and would not break his word for fifty thousand dollars. That after this the respondent put his hand in his breast pocket, and appeared to be producing from his pocket a piece of paper, and said to McDougall, "I can fetch you now. I have one check left, and only one. I will give you that for the interest of you and your boys." To which Mr. McDougall replied, "Put up your damnable corruption." That the respondent then said that the

expression, "damnable corruption," was wicked; to which the witness replied that he could prove by the Bible that anything that was corrupt was damnable, and that the respondent said, "You can." After these statements the witness seemed to think, and said more than once on being pressed, that there was nothing more of consequence that he could think of. He said also, that in the room the respondent had said that it was not Mr. Barber's fault about the magistrate matter; that the Reeve had never sent up McDougall's name as a grand juror, and that the list was made up from the grand jurymen; and that he had replied that it was no use telling him that, as on his former visit he had said it was his fault, and that he had himself made up the list. To which the respondent said that he had made up the list, and that it was the Reeve's fault in not sending it up. I note particularly that McDougall only mentioned at a late period in his evidence, and apparently as recollecting what had not been in his mind when he was giving his direct account of what took place in the room, the fact that the magistrate matter had been talked of, because from the whole evidence I am satisfied that it was the prominent if not the only topic talked of in the room, and this circumstance has a material effect on the view to be taken of the honesty of the evidence. I may now also mention that from McDougall's own evidence, as well as from that of the respondent and Mr. Barber, it is perfectly clear that McDougall was in no amiable humor that day with his visitors; that he was or professed to be in a great hurry, and unable to give time to talk with them, and was in fact treating them with very scant courtesy or civility; and that it is exceedingly improbable for these reasons, apart from others which I have to mention, that he should have spent the time, or talked in the manner stated by him.

So far the witness had only approached the charges in question in what he said about the check. Being still pressed as to whether there was not something more, and

after again saying he did not recollect anything more, he seemed suddenly to recollect something that had been forgotten, and exclaimed, "Oh, yes! there was something more in the room. He said he would telegraph to Toronto, and have me appointed a magistrate. I said if it was for the sake of voting, or to obtain a vote, I would not accept it; that I would not accept it in that way. He said if I did not comply with that way he would report me to the Government as being a bad character. I said if he did I would go in defence of my character."

The explanation given by the respondent is that he had called, as McDougall says, not in December, but within a week before the 10th January, and that then McDougall had excited his sympathy by the story of his grievances, going back to confederation, and telling how he had been treated by the Reform party. One complaint was that Mr. Barber had been chosen to run as local member and McDougall set aside, though he was qualified for the position. But the principal complaint seems to have been that in the recent commission of the peace five magistrates had been appointed in the next school section and none in his, while he was as competent as some of those who had been appointed. The respondent denies entirely what McDougall says as to his having taken the blame on himself, or having said that he made the lists, or having said anything about Robinson's hotel; and he says that in fact he had nothing to do with making the lists, further than, as Reeve of Oakville, he sent to Mr. Barber a list of names there. McDougall does not live in Oakville. The reason of the second visit to McDougall is stated by the respondent as having been solely to explain to McDougall how his name had been omitted, as the respondent had learned the reason from Mr. Barber, to whom he had mentioned the earlier interview; and the respondent states further, that McDougall was so exceedingly excited, and evinced such an antipathy to Mr. Barber, that he took him aside merely to endeavor to obtain an opportunity of being heard more coolly, and

that all that took place in the room was the giving of the explanation; and he entirely denies the matters alleged in support of the present charges.

I cannot say that the evidence leaves on my mind the slightest impression of the truth of the charges made by McDougall. I should, if necessary, apply to the charges, as also to those respecting Robins and Peake, the caution which has been on other occasions urged as necessary in dealing with evidence of an unaccepted offer. But there does not exist, in my view, any necessity for resorting to that rule. I am satisfied from the whole evidence which I have heard that the contest was carried on by the respondent with a scrupulous and honest endeavor to avoid any violation of the law against corrupt practices. I regard it as improbable to so high a degree as to be incredible, except on the clearest testimony, that the respondent should have attempted what McDougall swears to; and I find no difficulty in the conclusion that the evidence of McDougall is untrustworthy, when in addition to the circumstances to which I have already adverted, I bear in mind that he was animated by feelings of bitter personal hostility to Mr. Barber, whom he connected with the personal slights and wrongs, real or fancied, under which he smarted; and that the story he now tells was first told for the purpose of damaging Mr. Barber, and was now only told under circumstances which induce the belief that it would not now have been told if it had not been told before. I have not, in this statement, alluded particularly to the cross-examination of McDougall, and I need say no more as to it, than that it fully bears out the view which I have expressed.

I dismiss the petition with costs.

The petitioners appealed from the above judgment to the Court of Appeal, but the appeal was dismissed with costs.

(10 *Commons Journal*, 1876, p. 32.)